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THE COURT-MARTIAL PANEL MEMBER
SELECTION PROCESS: A CRITICAL ANALYSIS

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either the Judge Advocate General's School, The United States Army, or any other governmental agency.

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40TH JUDGE ADVOCATE OFFICER GRADUATE COURSE

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THE COURT-MARTIAL PANEL MEMBER
SELECTION PROCESS: A CRITICAL ANALYSIS

by MAJ S. A. Lamb

ABSTRACT: The court-martial panel member selection process has changed significantly during the history of our armed forces. Since the adoption of the Uniform Code of Military Justice in 1950, however, the court-martial panel member selection process has not changed in any significant respect. The present system is ill-suited to meet both the needs of military justice and discipline. The Code should be amended to create a system of panel member selection which is not only responsive to military discipline, but which provides service members with panels that are both fairly and impartially selected and represent a fair cross-section of the military community.

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[I]t is proper that you should understand what I deem the essential principles of our government, and consequently those which ought to shape its administration. . . . Equal and exact justice to all men . . . and trial by juries impartially selected -- these principles form the bright constellation which has gone before us, and guided our steps through an age of revolution and reformation. . . . They should be the creed of our political faith . . . the touchstone by which to try the services of those we trust; and should we wander from them in moments of error or alarm, let us hasten to retrace our steps and regain the road which alone leads to peace, liberty, and safety.¹

I. INTRODUCTION

This statement, taken from Jefferson's first inaugural address, highlights the importance of trial by jury to our system of government. The civilian system of criminal justice has been very protective of

an individual's right to a jury trial. Prior to and since Jefferson's first inaugural address, the Constitution, the Bill of Rights, case law, and federal statutes have insisted that juries be fairly and impartially drawn from a cross-section of society and not be the result of the deliberate inclusion or exclusion of particular individuals and classes of society.²

The military system of criminal justice has not been so protective. Although many of the constitutional values espoused by the civilian system of justice are present in the military, they are tempered by the premise that the Sixth Amendment right to jury trial is not applicable to the military.³ Certainly the court-martial panel, the military's corollary to a jury, is vastly different in both substance and structure to a civilian jury. Referred to as "the major difference between military and civilian practice,"⁴ the court-martial panel and the method for its selection are frequent sources of criticism.⁵

The Uniform Code of Military Justice⁶ employs a method for selecting court-martial panel members which differs greatly from the method used by the federal courts for selecting jurors.⁷ Although the Code recognizes, through case law, the right of every accused service member to a fair and impartial jury, it does not accede to the majority of rights conferred by and inferred through the Sixth Amendment.⁸

This article assesses the current method for court-martial panel member selection. The article begins by exploring the historical background to the jury trial, and, concomitantly, jury selection. The employment of the jury as a means for determining culpability and the means for selecting the jury will be examined from the Greco-Roman jury system to the current federal jury system. The historical background of the court-martial panel will also be reviewed, from its early origins and inception in this country under the Articles of War to its present format under the Code.

The present method of court-martial panel member selection will then be examined in relation to the present federal model and the American Bar Association Standards for Criminal Justice.⁹ The article will then discuss the constitutional considerations and judicial reaction to the present system of court-martial panel member selection. Finally, the article will review numerous problems with the present system and propose a revision of the UCMJ.

II. HISTORICAL BACKGROUND TO THE RIGHT TO A JURY TRIAL

The exact origin of the jury trial as a system for administering justice is uncertain. However, the earliest recorded examples of jury trial bear little resemblance to the current federal model. Indeed, the concept of a fair and impartial jury composed of a cross-section of society has been established within the last few centuries. The purpose for examining the historical foundation of the jury is to allow a valid comparison between past practice, the current federal

model, and the present system for court-martial panel member selection.

A. THE GRECO-ROMAN TRADITION

1. The Greeks

The first jury trial was recorded over three thousand years ago by Aeschylus in his play Euminides.¹⁰ This jury consisted of twelve citizens of Athens who voted six for conviction and six for acquittal in the matricide prosecution of Orestes.¹¹ Pallas Athena, as judge, cast the deciding vote for acquittal.¹²

Euminides is significant in several respects. First, it reflects that early juries were not composed of a cross-section of society. The requirements for citizenship in Athens were quite rigorous.¹³ Only property owners who were capable of serving the army as either a cavalryman or a hoplite (heavily armed troop) qualified as citizens.¹⁴ Second, the trial of Orestes reveals that early jury trials were not

encumbered by the principle of unanimity of verdict as a requirement. Finally, it places the judge, Pallas Athena, as the tie-breaker and a voting member.

By the sixth century B.C., Solon had arranged the jury into a standing body of fifty-one citizens of the highest class of Athens.¹⁵ Known as the Areopagus, this tribunal heard cases and decided outcomes by majority vote.¹⁶ There was no set number of jurors for any given case, although the number of jurors rose with the relative importance of the case.¹⁷

More importantly, Solon began to open up the eligibility for jury duty to the general assembly to all Athenian citizens.¹⁸ The general assembly was the appellate body to which all appeals from the decision of the Areopagus were sent.¹⁹ Again, the general assembly, which ranged in size from 200 to 1500 members, decided by majority vote.²⁰

Toward the latter part of his administration, Solon reconstituted the Areopagus into the Heliaea, a body of six thousand jurors drawn from all classes of citizens

by lot.²¹ The Heliaea in turn was composed of ten 500-man jury panels, or Dykasteries, and a one hundred-man reserve pool of jurors.²² The decision of a Dykast was by majority vote and not subject to appeal to the general assembly.²³

By the time of the Heliaea, significant efforts were made to make the Dykast more representative of the population. Although citizenship was still a requirement, all classes of citizens were eligible and were drawn by lot. This represents a conscious intent to ensure that partisanship did not play any part in jury membership. Additionally, the judge was replaced by a magistrate who did not vote or decide issues of law.²⁴

2. The Romans

The origins of the Roman jury system can be traced to roughly 450-51 B.C.²⁵ It was during this period that the Decemvirs returned from Athens, where they had been sent to investigate the laws of Solon.²⁶ The Roman jury, or Judex, was similar to the Greek Dykast

in that its membership was strictly limited to Roman citizens of the highest social order.²⁷ Originally, only senators were eligible to serve on a Judex.²⁸ During the consulship of Gaius Gracchus, membership was briefly extended to the equestrian class (merchants and landowners), but Lucius Cornelius Sulla returned it to the sole province of the senatorial class less than forty years later.²⁹

Unlike the Dykasteries, the Roman Judices were supervised by a Praetor, or judge, who ruled on issues of law and instructed the jury.³⁰ Like the Dykast, the Judex determined its verdict on the basis of a majority vote.³¹ To prevent undue influence from other jury members, the Judex employed secret balloting.³² This was accomplished by placing their respective votes in an urn, to be counted by the Praetor.³³

The Judex was chosen by the Comitia, the general assembly of the Senate, for a period of one year.³⁴ The Judex numbered 81 members.³⁵ Both prosecution³⁶ and defense were accorded fifteen challenges each, leaving a far smaller jury than the Dykast.³⁷ Although the

members of the jury were each sworn to perform their duties in a fair and impartial manner,³⁸ bribery, intimidation and even an occasional murder of a jury member were not uncommon.³⁹

B. THE BRITISH TRADITION

Popular theory is that the origin of the British jury system was introduced to the island by the Romans during the consulship of Claudius (41-50 A.D.).⁴⁰ There is, however, no compelling evidence of a jury system similar to the Greco-Roman system employed on the British Isles until after the Norman Conquest in 1066.⁴¹ Before this time, trial by ordeal, compurgation, and combat were the preferred methods for determining criminal culpability.⁴²

Shortly after the Norman Conquest, an accused began to receive the option of a jury trial.⁴³ The jury was selected from freemen by the local sheriff, earl, or perhaps even the king.⁴⁴ Although trial by jury remained optional, there was a distinct incentive, known as prison forte et dure, to opt for jury trial

over trial by ordeal, compurgation or combat.⁴⁵ Prison forte et dure was a statute passed in 1219 which allowed the local sheriff to imprison any accused who decided against electing a jury trial.⁴⁶ The imprisonment included severe forms of torture, which resulted in either reconsideration by the accused, or death.⁴⁷

By 1340 the jury had developed into a body of twelve members.⁴⁸ The jury was always selected by agents of the crown, usually the local sheriff.⁴⁹ All members of the jury were freemen, and it was not unusual for a trial jury to include knights and other noblemen who had been on the original accusing jury.⁵⁰ The defendant was allowed 35 challenges.⁵¹ Since the jury was selected by an agent of the crown, the prosecution was not allowed any challenges.⁵² For many years, the verdict was determined by the majority vote of the jury.⁵³ In 1367 a statute required unanimous verdicts.⁵⁴

By 1705, jury membership was extended from freemen to include peers or equals.⁵⁵ A peer was any male

person who was between the age of 21 and 70, not outlawed or a convict, and not an alien.⁵⁶ Although the list of prospective jurors was maintained by the sheriff, jurors were selected randomly for each case by lot.⁵⁷

C. THE AMERICAN TRADITION

The British brought their system of jury trial to the American colonies.⁵⁸ Both the Massachusetts Bay Colony and the Colony of Virginia had provisions for jury trial in a serious criminal case.⁵⁹ By the time of the drafting of the Constitution and the Bill of Rights, the right to a jury trial in criminal cases was well established. Two events in English history, the Star Chamber trials in the 16th and 17th centuries,⁶⁰ and Penn's Case,⁶¹ served to imbue the colonists with a very strong belief that the right to a jury trial in criminal cases was a fundamental right of the highest importance.

The Constitution⁶² and Bill of Rights⁶³ both contain guarantees of the right to a jury trial in criminal

cases. Although there was disagreement before enactment of the Seventh Amendment⁶⁴ about the necessity for language guaranteeing the jury trial in civil cases,⁶⁵ the right to a jury trial in criminal cases was never in question. Indeed, the staunchest opponent to a constitutional provision guaranteeing civil jury trials admitted that, in relation to criminal cases, the right to a jury trial was to be viewed as either a "valuable safeguard to liberty [or] . . . the very palladium of a free government."⁶⁶

The Supreme Court has viewed the right to a jury trial, as guaranteed under Article III, Section 2, Clause 3 of the Constitution and the Fifth and Sixth Amendments to the Bill of Rights, as applying differently to the federal government and to the states. Although the right to a fair and impartial jury trial applies to the states under the Fourteenth Amendment,⁶⁷ the requirements under federal law that the jury consist of twelve members and reach a unanimous verdict do not apply to the states.⁶⁸

Although the Court has not required the states to implement the federal model for jury selection,⁶⁹ it has scrupulously required both the states and federal government to maintain a jury system that meets the "impartial jury" requirement of the Sixth Amendment.⁷⁰ This is done by requiring the selection of jury members to be the result of a procedure which seeks a fair cross-section of the community⁷¹ and does not deliberately include or exclude particular individuals and classes of society.⁷²

While the courts have required a procedure which seeks a fair cross section of the community, they have not required a procedure which utilizes random selection. Although historically, random selection was commonly used in America to select the actual jury venire, the jury pool was often selected by means which were far from random.⁷³ Common sources for determining the jury pool included voter lists, telephone books, city directories, tax rolls, and "key men."⁷⁴ "Key men" were prominent individuals in the community selected by the clerk or jury commissioner to nominate

suitable persons in the community who filled the requisite qualifications.⁷⁵

Before 1948, federal law required that jurors be selected for duty in the district courts using the same method employed by the local state courts.⁷⁶ In 1942, the Knox Committee set out the ideal standard for qualified jurors:

[J]urors to serve in the district courts of the United States should be drawn from every economic and social group of the community without regard to race, color, or politics, and that those chosen to serve as jurors should possess as high degree of intelligence, morality, integrity, and common sense, as can be found by the persons charged with the duty of making the selection.⁷⁷

Before 1968, both the federal courts and state courts commonly employed the "key man" system to select the jury pool.⁷⁸

The federal practice of jury selection is now governed by statute.⁷⁹ The current practice is based on the premise that the membership of the jury is "selected at random from a fair cross section of the community."⁸⁰ This proscribes the use of the "key man" system to select the jury pool. Any person is qualified for jury service unless he or she: (1) is not at least eighteen years old, a citizen of the United States, and has resided within the judicial district for the past year; (2) is unable to speak, read, write, and understand English; (3) is mentally or physically incapable of performing jury duty; or (4) has a State or Federal criminal charge pending which carries the possibility of imprisonment for more than one year.⁸¹

Statutory exclusions and exemptions for jury service exist. Volunteer safety personnel (firefighters and members of rescue and ambulance squads) are excused upon individual request.⁸² Active duty members of the military, firemen, policemen, and public officers of the United States are barred from jury service.⁸³ Other groups and classes may be excused upon individual

request only when the district court finds that jury service imposed upon a specific group or class would impose "undue hardship or extreme inconvenience."⁸⁴ No citizen can be excluded from jury service on the basis of race, color, religion, sex, national origin, or economic status.⁸⁵

The exact mechanics of jury selection are not prescribed by statute; however, guidelines and specific requirements exist. For example, each district court must develop a written plan: (1) which does not discriminate against any citizen, and (2) which meets the objective of the representational cross-section requirement through random selection of both the jury pool and the jury venire.⁸⁶ The United States Attorney General must approve the plan,⁸⁷ which must utilize either a voter registration list or the list of actual voters within the district or subdivision as a source from which the initial pool of jurors will be randomly selected.⁸⁸ Final selection of the jury venire must be by a jury wheel or other random lot selection process.⁸⁹ The jury commission or clerk of court manages the jury selection system.⁹⁰

III. HISTORICAL BACKGROUND TO THE COURT-MARTIAL PANEL

The origin of the court-martial panel is even less certain than the origin of the jury trial. The concept of a court-martial itself can be traced to the Roman legions.⁹¹ At that time, it was customary for the tribune of the legion to administer justice through a magistri militum.⁹² The magistri militum consisted of either the tribune acting as judge or with the assistance of a council chosen by the tribune.⁹³

A. THE EARLIEST COURTS-MARTIAL

The early Germanic tribes, the French, the Swedes, and the Anglo-Saxons all maintained a system of military discipline. The German courts-martial, or militargerichts, were established by the year 1487.⁹⁴ The militargerichts were presided over by either the Duke, a military chief, or his designated priests, who accompanied the army.⁹⁵ The French conseils de guerre

were established by 1655 and were an instrument of command.⁹⁶

The Anglo-Saxons, under William the Conqueror, brought the Court of Chivalry to the British Isles in 1066.⁹⁷ The Court of Chivalry originally consisted of chevaliers, appointed by the King, to act as an arbiter on matters of discipline and honor amongst his peers.⁹⁸ Later, it evolved into a court composed of the commander of the royal armies as lord high constable, assisted by the earl marshal and three doctors of civil law.⁹⁹

King Gustavus Adolphus of Sweden was the first ruler to utilize a court-martial panel more closely resembling a modern court-martial panel. In 1621, he established two separate courts-martial.¹⁰⁰ The first was a regimental court-martial, composed of the regimental commander and members elected from the regiment.¹⁰¹ The second was a standing court-martial composed of the commanding general and high-ranking officers selected by him.¹⁰²

The Code of Adolphus affected the British court-martial system. In 1642, Lord Essex's Code established a military commission of a commanding general and 56 officers to administer military justice.¹⁰³ A court was formed by a quorum of twelve or more members.¹⁰⁴ In 1686, the court-martial was refined by James II in "English Military Discipline."¹⁰⁵ This document established the court-martial at regimental level, presided over by the regimental commander and consisting of at least seven officers.¹⁰⁶ This document specified that the members should all be at least the rank of captain, unless not enough captains were available, in which case "inferior" officers would be allowed to sit as members.¹⁰⁷ The decision of the court was by simple majority.¹⁰⁸

B. THE BRITISH MUTINY ACT

In 1689, the first British Mutiny Act was passed by Parliament.¹⁰⁹ The act applied to all officers and soldiers in the Army accused of mutiny, sedition, or desertion.¹¹⁰ It conferred authority to convene courts-martial to officers of the rank of colonel or higher if

commissioned to do so by either the crown or the general of the army.¹¹¹ The court-martial panel was to number at least thirteen officers, all of whom were to be at least the rank of captain.¹¹² The decision of the court was by simple majority, unless the death sentence was rendered, in which case at least nine of the thirteen officers must vote for death.¹¹³

C. COURTS-MARTIAL IN AMERICA

1. Courts-Martial in the Early Colonies

By its terms, the first Mutiny Act remained in effect from April 12, 1689 to November 10, 1689.¹¹⁴ Excepting 1698-1701, successive Mutiny Acts, subsequently referred to as Articles of War, were passed by Parliament until 1879.¹¹⁵ It was this system of courts-martial that was brought to the colonies and incorporated into the Massachusetts Articles of War¹¹⁶ passed by the Provisional Congress of the Massachusetts Bay Colony on April 5, 1775.¹¹⁷

2. Courts-Martial During the Revolutionary War

At the beginning of the Revolutionary War, the British Articles of War in existence¹¹⁸ differed significantly from the Massachusetts Articles of War in how they treated courts-martial. The British Articles of War provided for both general and regimental courts-martial.¹¹⁹ The general courts-martial were to be composed of not less than thirteen officers; the regimental courts-martial were of unspecified size.¹²⁰ Field grade officers were not to be tried by courts-martial composed of officers who were not at least the rank of captain.¹²¹ For the first time, neither court-martial could be presided over by the commanding officer.¹²²

The Massachusetts Articles of War retained the requirement that the general court-martial consist of at least thirteen officers, but added the requirement that they all be at least the rank of major.¹²³ The regimental court-martial was to consist of at least five members when available, but never less than three.¹²⁴ The regimental court-martial was not to be

presided over by the commanding officer, but he was to approve any sentence adjudged by majority vote of the court.¹²⁵

The American Articles of War of 1776¹²⁶ retained the thirteen member general court-martial and extended the prohibition against the convening authority presiding over regimental courts-martial to general courts-martial.¹²⁷ They also retained the requirement that field grade officers be tried by courts-martial composed of officers of the rank of captain or higher.¹²⁸

3. Courts-Martial After the Revolutionary War

In 1786 the Articles of War were significantly revised in relation to the composition of the courts-martial.¹²⁹ The membership of the general court-martial was reduced to a minimum of five when operational requirements existed which prevented convening a court-martial of thirteen officers.¹³⁰ In turn, regimental courts-martial were reduced to three officers.¹³¹ Authority to convene this form of

court-martial (referred to as a garrison court-martial) was extended to officers commanding separate garrisons, forts, barracks, or posts consisting of soldiers from different corps.¹³² In addition, officers were to be tried only by general courts-martial and by officers of equivalent rank or higher.¹³³

4. Courts-Martial During and After the Civil War

While the Union Army operated under the Articles of War of 1806,¹³⁴ the Confederate Army operated under a separate provision passed by the Congress of the Confederate States of America on October 9, 1862.¹³⁵ The Confederate Congress established a court-martial system similar to that in existence under the Code of Adolphus. The courts-martial were convened by the President, consisted of three permanent members holding the rank of colonel of the cavalry, and were assigned down to the separate army corps level.¹³⁶ A quorum of two members was required for the court to hear cases.¹³⁷ This court-martial system was unique in that it was independent of the command to which it was assigned.

In 1874 the Articles of War were amended, to include a major revision to the courts-martial.¹³⁸ A field officer court-martial was added. In time of war, every regiment was to have a field officer detailed as a one-man court-martial to handle all offenses by soldiers within the regiment.¹³⁹ No regimental or garrison courts-martial were to be convened when a regimental court-martial could be convened.¹⁴⁰ Congress virtually eliminated the regimental and garrison courts-martial in 1890 when it established the summary court.¹⁴¹ The summary court replaced the regimental and garrison courts-martial in time of peace.¹⁴² It was a one-man court consisting of the second highest ranking line officer on the post, station, or command.¹⁴³

In 1916, Congress further amended the Articles of War and provided for the three separate forms of courts-martial still in existence today: the general court-martial, special court-martial, and summary court-martial.¹⁴⁴ All officers, to include Marine Corps officers detached for service with the Army, were eligible to serve on courts-martial.¹⁴⁵ General-courts martial were to be composed of from five to thirteen

officers; special courts-martial were to be composed of from three to five officers; and summary courts-martial were to be composed of a single officer.¹⁴⁶

General courts-martial could be convened by the President on down the chain of command to a separate brigade or district commander; special courts-martial could be convened by a commander of a detached battalion or other command; and summary courts-martial could be convened by a commander of a detached company or other detachment.¹⁴⁷ Though Article 5 still required general courts-martial to be composed of thirteen officers whenever it would not create "manifest injury to the service,"¹⁴⁸ the Manual for Courts-Martial notes that the convening authority's decision is discretionary and not subject to further review.¹⁴⁹ It also notes a continuing duty of subordinate commanders to "keep in touch with the business before general courts-martial . . . and from time to time . . . mak[e] recommendations to the appointing authority as to relieving or adding new members . . . or appointing a new court" ¹⁵⁰ There is no indication in the Manual for Courts-Martial whether this provision was

present to allow the convening authority to take "corrective action" if the panel adjudicated undesired results, or if this provision was designed to ensure that new members were rotated through panel member duty.¹⁵¹

5. Courts-Martial After World War I

World War I spawned the Ansell-Crowder dispute, which challenged whether the purpose of the Articles of War should be to promote discipline or to administer justice.¹⁵² Although this resulted in a significant increase in due process rights for soldiers,¹⁵³ it did not create a more liberal court-martial panel selection process. Indeed, when Congress revised the Articles of War in 1920 they both reduced the number of officers required to sit on most courts-martial and, for the first time, specified qualifications for service on a court-martial panel that resulted in a clear preference for panels composed primarily of senior officers.¹⁵⁴

The Articles of War of 1920 deleted the requirement that the convening authority detail thirteen officers

to a general court-martial whenever it would not cause "manifest injury to the service."¹⁵⁵ Instead, it merely required all general courts-martial to consist of no less than five officers¹⁵⁶; special courts-martial to consist of not less than three officers,¹⁵⁷ and summary courts-martial to consist of one officer.¹⁵⁸

Additionally, Article 8 required that one of the members of a general court-martial be a "law member," preferably a judge advocate.¹⁵⁹ The Manual for Courts-Martial notes that "it is not expected that appointing authorities will usually detail on a general court-martial many more members than required by the statute."¹⁶⁰ Furthermore, the Manual for Courts-Martial recommends no more than nine members, clearly evincing a preference for smaller panels.¹⁶¹

More importantly, Article 4 specified that:

When appointing courts-martial the appointing authority shall detail as members thereof those officers of the command who, in his opinion, are best qualified for the duty

by reason of age, training, experience, and judicial temperament; and officers having less than two years' service shall not, if it can be avoided without manifest injury to the service, be appointed as members of courts-martial in excess of the minority membership thereof.¹⁶²

This provision was adopted by Congress at the urging of the Judge Advocate General of the Army (Major General Enoch H. Crowder) and the Kernan Board of the War Department.¹⁶³ The Manual for Courts-Martial further specified that staff judge advocates were responsible for advising convening authorities of the qualifications for service on courts-martial pursuant to Article 4.¹⁶⁴

6. Courts-Martial After World War II

During World War II approximately two million courts-martial were convened.¹⁶⁵ Numerous examples of harsh punishments and extremely abbreviated due process were reported to Congress.¹⁶⁶ After the war, Congress was deluged by demands for reform of the court-martial

system from organizations such as the American Bar Association and the American Legion.¹⁶⁷ The American Bar Association made two recommendations to Congress that directly related to the court-martial selection process.¹⁶⁸ First, the ABA recommended that enlisted members be placed on courts-martial.¹⁶⁹ Second, it recommended that the power to convene courts-martial be removed from the province of the commander.¹⁷⁰

The first recommendation became part of the Elston Act¹⁷¹ and was incorporated into Article 4 of the Articles of War.¹⁷² Specifically, Article 4 now provided for an enlisted soldier to request a court-martial panel composed of at least one third enlisted members.¹⁷³ As with officers, the convening authority was directed to select enlisted persons with at least two years of service and who were best qualified by reason of age, experience, training, and judicial temperament.¹⁷⁴

The second recommendation was not incorporated into the Elston Act. It was far too radical a proposal: "[n]o commander would conceive of surrendering to some

lawyer the power to decide whether a court-martial best suited the interests of his outfit's discipline."¹⁷⁵ Interestingly, this view was not widely held by staff judge advocates. At least one staff judge advocate believed it was customary for most convening authorities to leave matters of courts-martial referral to the discretion of the staff judge advocate.¹⁷⁶

Although Congress did not enact the American Bar Association recommendation that the power to convene courts-martial be removed from the province of the commander, it was not insensitive to the problem of command influence over courts-martial. Its response to the problem was to enact Article 88, which proscribed the convening authority and all commanders from censuring, reprimanding, admonishing, coercing or unlawfully influencing any member in reaching the findings or sentence in any case.¹⁷⁷

7. The Development of the Uniform Code of Military Justice

The Articles of War of 1948 created by the Elston Act were short-lived. The Elston Act did not apply to the Navy, and because of drafting problems, it was unclear whether it applied to the Air Force.¹⁷⁸ By the beginning of the 1949 session, Congress sought to create a system of military justice which would encompass all services. The Morgan Committee,¹⁷⁹ established by Secretary of Defense James V. Forrestal and chaired by Harvard Law Professor Edmund M. Morgan, introduced legislation which resulted in the Uniform Code of Military Justice .¹⁸⁰

Once again, the American Bar Association sought to remove commanders from the process of convening courts-martial.¹⁸¹ This time, Mr. George Spiegelberg, testifying on behalf of the ABA, recommended that the task of appointing members for courts-martial be transferred from the commanders to the Judge Advocate General and his designated representatives.¹⁸² To support his recommendation, Mr. Spiegelberg noted a

recent independent commission report (by the Vanderbilt Committee) that 16 of 49 general officers "affirmatively and proudly testified that they influenced their courts."¹⁸³

Professor Morgan responded to the ABA recommendation by calling it both "impracticable" and "unthinkable that [the Judge Advocate General] could be permitted to dictate to the commanding officer the assignment of [court-martial] duties of [sic] officers under his command."¹⁸⁴ The ABA's recommendation was not endorsed by the Morgan Committee and received a cool reception from both the House and Senate Subcommittees on the Committees for Armed Services.¹⁸⁵ In addition to Professor Morgan's opposition, the subcommittee was very likely swayed by the statement of Colonel Frederick Bernays Wiener, a noted former judge advocate who asserted:

There is a suggestion on the panel system that has now been watered down. The suggestion is that the Judge Advocate General select the court from the panel. Who selects

the panel? The commanding general. Why shouldn't he select the court? In practice, and I speak from experience in four jurisdictions, the court is picked by the staff of the Judge Advocate General. He finds out who is available and he knows the officers at headquarters who have the experience and who have the proper judicial temperament, which the Fourth Article of War requires, and he tries to get the ablest and most experienced people possible.¹⁸⁶

Articles 22, 23, and 24 of the UCMJ retained the authority of commanders to convene courts-martial that previously existed in Articles 8, 9, and 10 of the Articles of War of 1948.¹⁸⁷ Article 25 of the UCMJ incorporated Articles 4 and 16 of the Articles of War of 1948.¹⁸⁸ Article 25 expanded the Elston Act provisions by making any member of an armed force eligible to sit on a court-martial of a member of another armed service.¹⁸⁹ Additionally, Article 25(c)(1) allowed a convening authority to convene a court-martial composed solely of officer members, over

the objection of the accused, whenever "physical conditions or military exigencies" prevented detailing enlisted members to the court.¹⁹⁰ The qualifications to be considered by the convening authority when selecting members were amended to "age, education, training, experience, length of service, and judicial temperament."¹⁹¹ Education was added as a factor from the Articles of War of 1948 and length of service was substituted for the previous requirement of two years of service.

Article 25 mirrored previous Article 4 of the Articles of War of 1948 by making accusers and witnesses for the prosecution ineligible to sit as members.¹⁹² In addition it made investigating officers and counsel ineligible to sit as members.¹⁹³ Finally, it specified a preference for panels senior in grade or rank to the accused.¹⁹⁴

The final provision of the UCMJ which affected the selection and composition of the court-martial panel was Article 26.¹⁹⁵ Article 26 replaced the law member of Article 8 of the Articles of War of 1948 with the

law officer.¹⁹⁶ Unlike the law member, the law officer was required to be an attorney certified by the Judge Advocate General of the respective armed service.¹⁹⁷ Additionally, the law officer was more like a judge and was not allowed to either deliberate or vote with the members.¹⁹⁸

Again, although the American Bar Association recommendation was not enacted, Congress was sensitive to the problem of command influence over courts-martial. Its response was to enact Articles 37 and 98.¹⁹⁹ Article 37 mirrored the language of Article 88 of the Articles of War of 1948 but included language prohibiting the convening authority from influencing the law officer or counsel.²⁰⁰ Article 98 made the knowing and intentional violation of Article 37 an offense under the code punishable by court-martial.²⁰¹

Since the enactment of the UCMJ in 1950, it has undergone major revisions in both 1968²⁰² and 1983²⁰³. Neither of these major revisions had a significant effect on the selection of courts-martial panel members.²⁰⁴ Once again, a recommendation was made in

1983 to remove the power to convene courts-martial from commanders.²⁰⁵ This recommendation, presented by Mr. Steven Honigman on behalf of the Association of the Bar of the City of New York, suggested that "the commander should be relieved an additional administrative burden, that of personal selection of members of the courts-martial jury [sic] under article 25(d)(2)."²⁰⁶ Although Mr. Honigman did not specify the preferred method for selecting court-martial panel members, he did "recommend that members of courts-martial be chosen at random from a pool of eligible individuals."²⁰⁷ As with the American Bar Association recommendation in 1949, this recommendation received little serious attention.²⁰⁸

III. CURRENT COURT-MARTIAL
PANEL MEMBER SELECTION PRACTICE

A. PRESENT CODE PROVISIONS AFFECTING
COURT-MARTIAL PANEL MEMBER SELECTION

1. Types and Composition of Courts-Martial

Article 16 specifies three types of courts-martial: general, special and summary.²⁰⁹ It further specifies two forms of general court-martial: (1) a judge presiding over a panel of not less than three members; and (2) a judge alone determining both findings and sentence, upon request by the accused.²¹⁰ Article 16 specifies three forms of special court-martial: (1) a panel of not less than three members; (2) a judge presiding over a panel of not less than three members; and (3) a judge alone determining both findings and sentence, upon request by the accused.²¹¹ The Summary court martial consists of one commissioned officer.²¹²

2. Convening Authority

Articles 22, 23, and 24 establish the convening authority of courts-martial.²¹³ Although the President or Service Secretary can designate any officer as a general court-martial convening authority, they are usually of the rank of colonel or captain (Navy or Coast Guard) and higher, in command of a separate brigade, wing, station, or larger unit.²¹⁴ Although the Service Secretary can designate any officer as a special court-martial convening authority, they are usually of the rank of lieutenant colonel or commander and higher, in command of a detached battalion, separate squadron, naval vessel, or larger unit.²¹⁵ Although the Service Secretary can designate any officer as a summary court-martial convening authority, they are usually of the rank of major or lieutenant commander or higher, in command of a detached company, detached squadron, or larger unit.²¹⁶

3. Criteria for Selection

Article 25 specifies the criteria for selection of panel members.²¹⁷ All active duty service members are eligible to sit as members.²¹⁸ However, only commissioned officers will sit on panels where the accused is a commissioned officer²¹⁹ and no member will be junior to the accused when it can be avoided.²²⁰ If the accused is enlisted, he can request a panel comprised of at least one-third enlisted members, provided physical conditions or military exigencies do not prevent empaneling enlisted members.²²¹

The convening authority is directed by Article 25(d)(2) to detail members to a court-martial who are, "in his opinion, best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."²²² Accusers, witnesses for the prosecution, investigating officers, and counsel are ineligible to sit as members.²²³

4. Challenges and Excusal of Members

Any member or the military judge can be challenged by either party for cause.²²⁴ The military judge rules on challenges for cause.²²⁵ In a special court-martial without a military judge, the members vote on the challenged member.²²⁶ Majority vote determines the outcome of the challenge, with a tie vote resulting in disqualification of the member.²²⁷ Both the accused and trial counsel are entitled to one peremptory challenge.²²⁸

The convening authority can excuse any member before the court is assembled.²²⁹ This authority may be delegated to the staff judge advocate, legal officer, or principal assistant.²³⁰

5. Voting Procedure

Findings of guilty are determined by a vote of at least two-thirds of the members,²³¹ by secret written ballot.²³² In a case where the death penalty is mandated by law, the members must return a unanimous

verdict of guilty to convict.²³³ If convicted, the sentence is also determined by two-thirds vote,²³⁴ except when the sentence imposed is more than ten years, in which case three-fourths of the members must concur in the sentence imposed.²³⁵

6. Prohibitions Against Command Influence

Article 37 prohibits convening authorities and commanding officers from censuring, admonishing or reprimanding any member, judge, or counsel about either the findings, sentence, or other function of the court-martial.²³⁶ It also prohibits any person subject to the code from attempting to coerce or otherwise unlawfully influence the action of any court-martial or convening, reviewing, or approving authority.²³⁷

Finally, Article 37 prohibits the consideration of either a member's performance during a court-martial or a counsel's zealous representation of an accused in the preparation of any report which might affect promotion, transfer, or assignment.²³⁸ Article 98 makes the

knowing and intentional violation of Article 37 an offense punishable by court-martial.²³⁹

B. MECHANICS OF COURT-MARTIAL
PANEL MEMBER SELECTION

While it is clear that the UCMJ establishes the various types of courts-martial,²⁴⁰ which commander can convene a particular court-martial,²⁴¹ and what factors the convening authority must consider when selecting members to sit on courts-martial;²⁴² it does not prescribe the mechanics for selecting members.

A common method for court-martial member selection²⁴³ begins with a memorandum from the office of the staff judge advocate to the major subordinate commanders. The memorandum requests nominations, usually by grade and number, of potential members for consideration by the convening authority.²⁴⁴ This memorandum includes the criteria for selection from Article 25(d)(2) and other allowable factors that the convening authority thinks are appropriate.²⁴⁵ The memorandum also

designates the period the members would serve as a standing panel.²⁴⁶

Once the nominations are received from the major subordinate commanders, the staff judge advocate will present these to the convening authority for his selection.²⁴⁷ It is common to include the Officer Record Briefs of the Officers and Personnel Folders of the Enlisted Members for the convening authority to review.²⁴⁸ It is also common to provide the convening authority with a copy of the complete duty roster of the unit²⁴⁹ should he elect to choose someone not on the list of nominees.

Once the convening authority makes his selections, the appropriate convening order is prepared and copies are distributed to the panel members to put them on notice of their impending duty. Normally, the convening authority delegates authority to excuse court-martial members to the Staff Judge Advocate pursuant to Article 25(e) and Rule for Courts-Martial 505.²⁵⁰

C. COMPARISON OF COURT-MARTIAL PANEL
SELECTION PROCESS TO FEDERAL PRACTICE
AND ABA STANDARDS FOR CRIMINAL JUSTICE

The federal practice of jury selection²⁵¹ is, in many respects, the paradigm example of the model system for jury selection advocated by the American Bar Association.²⁵² The current practice of selecting courts-martial panel members differs from the federal practice and ABA standards in many respects. In some areas, it falls short of the protection guaranteed an accused under federal practice and the ABA standards. In a few areas, it provides more protection to an accused than do either the federal practice or the ABA standards.

1. Types and Composition of Courts-Martial

Federal practice makes jury trial available to any accused who faces the prospect of serving more than six months in confinement.²⁵³ The ABA standards would extend the right to jury trial to any accused who faces any prospect of confinement.²⁵⁴ The UCMJ meets the ABA

standards. The UCMJ provides greater protection to an accused than the federal practice since an accused has a right to a panel at a special court-martial.

Although there is no right to a panel at a summary court-martial, which can impose up to thirty days of confinement, the accused can decline a summary court-martial and thereby ensure his right to a panel at a higher level court-martial.²⁵⁵

The federal practice is for juries to consist of twelve persons.²⁵⁶ The ABA standards call for twelve jurors, unless the potential for confinement is limited to six months, in which case six jurors are sufficient.²⁵⁷ The present courts-martial practice does not meet either the federal practice or the ABA standards.

Federal practice and the ABA standards allow an accused to waive jury trial only with the consent of the prosecutor.²⁵⁸ The UCMJ gives the accused the right to waive a panel and be tried by judge alone and does not require the consent of the trial counsel.²⁵⁹ Although the military judge may hear argument from

trial counsel in opposition to the accused's election to be tried by judge alone, the request will routinely be granted.²⁶⁰

2. Convening Authority

The federal practice and ABA standards have no real corollary to the powers of the convening authority.²⁶¹ Federal practice and the ABA standards do not mandate a particular method for jury selection.²⁶² In this vein, the UCMJ is consistent with federal practice and the ABA standards. This is, however, the only similarity.

Federal practice and the ABA standards mandate a selection procedure which is random and utilizes either an impartial jury commission or the clerk of the district court as the jury official.²⁶³ In the military, the convening authority is the "jury official."

3. Criteria for Selection

Federal practice and the ABA standards list minimum qualifications for jury service.²⁶⁴ In contrast, the UCMJ directs the convening authority to select those individuals, who are "best qualified."²⁶⁵ A goal of both the federal practice and the ABA standards is to achieve a jury pool comprising a cross-section of the community.²⁶⁶ The UCMJ has no such goal and Article 25(d)(2) is often used to justify panels which are comprised solely of high ranking officers and/or noncommissioned officers.²⁶⁷

4. Challenges and Excusal of Members

Federal practice and the ABA standards direct that, once a jury is drawn, only the judge can excuse a juror through either a challenge for cause or a peremptory challenge.²⁶⁸ Peremptory challenges are determined by statute.²⁶⁹ Military practice allows the convening authority to excuse any member or even completely change the panel before arraignment.²⁷⁰ Additionally,

the convening authority can delegate the authority to excuse members to his staff judge advocate.²⁷¹

Military practice is similar to federal practice in relation to causal challenges. Peremptory challenges, although determined by statute,²⁷² are quite different in courts-martial than in federal practice. Both trial counsel and defense counsel are allowed one peremptory challenge.²⁷³ Because courts-martial vary in size, peremptory challenges encourage both defense counsel and trial counsel to engage in a numbers game. Often peremptories are exercised to achieve a tactical advantage in relation to the size of the panel.²⁷⁴

5. Voting Procedure

Military practice differs greatly from both federal practice and the ABA standards in relation to voting procedure. Federal practice and the ABA Standards require unanimous verdicts.²⁷⁵ Although courts-martial do employ secret written balloting, unanimous verdicts are only required in one instance, a capital case.²⁷⁶

6. Prohibitions Against Command Influence

Although there are federal statutes prohibiting jury tampering,²⁷⁷ Articles 37 and 98 are unique in their application to the convening authority.

IV. JUDICIAL REACTION TO THE COURT-MARTIAL PANEL MEMBER SELECTION PROCESS

A. THE SUPREME COURT

Although the Supreme Court has not directly addressed the applicability of the Sixth Amendment to the court-martial panel member selection process, it has clearly indicated through dicta that it does not consider the process to be constrained by the Sixth Amendment. In Ex parte Milligan, while holding that military commissions organized during the civil war lacked jurisdiction to try civilians while the local courts were open, operating, and not in a state of occupation, the Court noted that "the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons

who were subject to indictment or presentment in the fifth."²⁷⁸

In a concurring opinion, four justices went even further and asserted that "the power of Congress, in the government of the land and naval forces and of the militia, is not at all affected by the fifth or any other amendment."²⁷⁹ Although this latter assertion has not been adopted by the Court,²⁸⁰ the former has been fully embraced.

Despite the divergence of opinions evidenced by O'Callaghan v. Parker²⁸¹ and Solorio v. United States,²⁸² there was clearly one area agreed to by all the justices: the Sixth Amendment right to a jury trial does not apply to the courts-martial process. In his spirited dissent of the demise of the service connection rule created by O'Callaghan v. Parker, Justice Marshall accepts this as fact.²⁸³ Indeed, he elevates the dicta in Ex parte Milligan by conceding that "the Court has held this exception [the Fifth Amendment exception from grand jury requirement]

applicable to the Sixth Amendment right to trial by jury as well."²⁸⁴

Although the Court has never clearly articulated why it is "doubtless"²⁸⁵ that the Sixth Amendment does not apply to courts-martial, the Court has fully accepted this as true.²⁸⁶

B. THE MILITARY APPELLATE COURTS

The Court of Military Appeals has uniformly and consistently rejected any claim that the Sixth Amendment right to a jury trial is applicable to courts-martial.²⁸⁷ However, neither the Court of Military Appeals nor the courts or boards of military review have ever contended that "the power of Congress, in the government of the land and naval forces and of the militia, is not at all affected by the fifth or any other amendment."²⁸⁸

Indeed, the Court of Military Appeals has long recognized the applicability of the due process and equal protection guarantees of the Fifth Amendment.²⁸⁹

The courts have been especially watchful of the court-martial panel member selection process in relation to its impact on fair and impartial juries,²⁹⁰ with special emphasis placed on an accused's right to a panel comprised of members properly selected under statutory criteria.²⁹¹ In addition, when issues of command influence under Article 37 have arisen, the courts have been quick to condemn the practice and order remedial measures.²⁹² However, although vigilant, the courts have been extremely deferential to the process, refusing to use its supervisory power to alter the process.²⁹³

1. The Right to a Fair and Impartial Panel

The courts have long recognized that the accused has the right to a fair and impartial panel. In United States v. Sears, the Court of Military Appeals reversed the convictions of two airmen because it found that the convening authority "assigned lawyers to the court to neutralize any attempt by individual counsel to influence the court to rule in favor of the accused."²⁹⁴ Specifically, the court found that the appointment of

three Air Force judge advocates after one of the accused elected civilian defense counsel "smack[ed] of court packing."²⁹⁵

In United States v. Hedges, the Court of Military Appeals affirmed the Navy Board of Review's order that a rehearing be held because the law officer erred in denying a motion for change of venue.²⁹⁶ Marine Corps Private Hedges was faced with a panel where seven of nine members were involved in some aspect of crime prevention, control, or detection.²⁹⁷ In particular, the president of the panel was a lawyer and two members were provost marshals.²⁹⁸ The court noted that, while "neither a lawyer nor a provost marshall is per se disqualified [T]he appearance of a hand-picked court was too strong to be ignored."²⁹⁹

Although neither Sears nor Hedges were decided expressly on Fifth Amendment due process grounds, the Court of Military Appeals specifically referred to both of these cases later in Crawford when it noted that:

Constitutional due process includes the right to be treated equally with all other accused in the selection of impartial triers of fact. Methods of selection which are designed to produce a court membership which has, or necessarily results in, the appearance of a "packed" court are subject to challenge.³⁰⁰

The courts have also applied due process analysis in resolving issues about challenges and the fluctuating size of a panel. In United States v. Carter, the Court of Military Appeals grappled with the problem of whether an accused was entitled to additional peremptory challenges to new panel members when the panel had been reduced to below a quorum because of previous challenges.³⁰¹ Although all the judges did not agree as to whether an accused was entitled to additional peremptories,³⁰² they did all agree that "the accused does possess a due-process right to a fair and impartial factfinder."³⁰³

Both peremptory challenges and challenges for cause have been strictly scrutinized by the courts to ensure

the accused receives a fair and impartial panel. The Court of Military Appeals applied the Supreme Court's holding in Batson v. Kentucky³⁰⁴ to courts-martial in United States v. Santiago-Davila.³⁰⁵ In so doing, it recognized that an accused has an equal protection right through the due process clause of the Fifth Amendment to be tried by a panel from which no cognizable racial group has been excluded.³⁰⁶ The right to a fair and impartial panel also requires the court to order a rehearing on sentencing when a challenge for cause is denied on a member who exhibits an inelastic attitude toward sentencing.³⁰⁷

Although the courts are willing to apply the equal protection prong of the due process clause, its application is limited to the actual process of selecting court members. In United States v. Wolff³⁰⁸ and United States v. Montgomery,³⁰⁹ the argument that a five-member panel violated equal protection under Ballew v. Georgia³¹⁰ was rejected. In Ballew, the Court struck down a five-member Georgia jury. The Court relied on a series of studies which suggested, inter alia, that reducing the jury size from six to five

might fail to provide an adequate cross-section of the community and would impair effective group deliberation.³¹¹ In United States v. Guilford, the Army Court of Military Review rejected a Ballew argument that a court-martial of seven members which required only five to convict was a denial of due process or equal protection.³¹²

2. The Right to Have a Panel Comprised of Members Properly Selected Under Statutory Criteria

The courts have scrupulously demanded that convening authorities adhere to the statutory selection criteria in Article 25. In particular, they have noted: (1) that Article 25(a)-(c) makes all ranks eligible for membership on courts-martial; and (2) that rank is not included as one of the six factors the convening authority is to consider under Article 25(d)(2) when selecting those "best qualified."³¹³ However, the courts have shown considerable deference to convening authorities and have, through their interpretation of Article 25(d)(2), both allowed and commended convening

authorities who consistently do not select lower ranking officers and enlisted persons.

In United States v. Crawford, the Court of Military Appeals noted that systematic exclusion of lower ranking enlisted persons is contrary to Article 25.³¹⁴ However, the court refused to accept appellant's assertion that systematic exclusion was established by the fact that the Army did not have a single panel member below the grade of E-4 from 1959 through 1963.³¹⁵ While recognizing that Article 25 and Congress clearly intended that all enlisted members were eligible to serve on courts-martial, the court noted that the statutory eligibility requirements will naturally result in panels comprised primarily of the senior ranks.³¹⁶

By recognizing that "there is a vast and vital difference between the list of prospective court members submitted by the staff judge advocate and the actual selections by the convening authority," the court held that the UCMJ does not require convening authorities to select members from all ranks.³¹⁷

Rather, the UCMJ merely requires that the convening authority not deliberately and systematically exclude the lower enlisted ranks.³¹⁸

In United States v. Greene, the Court of Military Appeals found deliberate and systematic exclusion of officers below the grade of O-5.³¹⁹ The panel in Greene consisted of three colonels and six lieutenant colonels.³²⁰ The convening authority selected these officers from a list of nominees which included, at the direction of his staff judge advocate, only officers of the grade of O-5 and above.³²¹ Upon a motion for appropriate relief from defense counsel, the military judge recessed the court and gave trial counsel the opportunity to determine, for the record, whether or not the convening authority had considered all officer grades in making his selection.³²²

Upon reconvening, trial counsel informed the judge that the convening authority had considered only those names on the list.³²³ In a Herculean display of patience, the judge explained to trial counsel that, although the convening authority could select

whomsoever he desired, he "should not exclude consideration of any officers except colonels and lieutenant colonels."³²⁴ During the following recess, a new list of nominees, which consisted of all ranks from second lieutenant to colonel, was forwarded to the convening authority; whereupon it was promptly rejected with the instruction that it include only lieutenant colonels and colonels.³²⁵

After additional inquiry by the judge, trial counsel finally stated for the record that the convening authority had reconsidered the matter and decided that the original panel was best qualified under Article 25.³²⁶ At this point, the accused requested to be tried by judge alone, noting for the record his desire for a panel which contained some lower ranking personnel.³²⁷ Stating that "we are not convinced that an improper standard was not used for the selection of the members of this court,"³²⁸ the court reversed and directed that a rehearing may be held.³²⁹

Greene is an important case because it highlights the degree of deference given to the convening

authority by the trial judge, the Air Force Court of Military Review, and the Court of Military Appeals. Although the Court of Military Appeals reversed the lower court, it did so simply because it was not clear from the convoluted machinations between the judge and the trial counsel that the convening authority had ever truly considered all grades of officers.

In United States v. Daigle, the Court of Military Appeals held that, although it was permissible for the convening authority to request panel nominees by rank, it was not permissible to exclude all lieutenants and warrant officers.³³⁰ It further noted that this process, which also failed to consider the statutory qualifications at either the nomination or selection phase, "was identical to that condemned in Greene."³³¹ The Army Court of Military Review struck down a similar selection process which excluded all company grade officers from consideration when the accused was a promotable first lieutenant.³³²

The Court of Military Appeals began to chip away at the general prohibition against using rank as a factor

in panel member selection in United States v. Yager.³³³
In Yager, the court was faced with a convening authority who employed random selection but excluded all soldiers below the grade of E-3.³³⁴ As an E-1, Yager contested this practice, citing Daigle and Greene as authority.³³⁵

The two member court³³⁶ affirmed Yager's conviction, reasoning that the disqualification was reasonably related to the statutory requirements enumerated in Article 25.³³⁷ Specifically, Judge Cook noted that Article 25(d)(1) would have excluded all E-2's and E-1's with a date of rank preceding Yager's³³⁸ and that the requirements of Article 25(d)(2) would exclude the vast majority of E-2's and E-1's.³³⁹

The courts have consistently taken corrective action³⁴⁰ where the panel member selection process deliberately and systematically excluded certain ranks. However, as long as the convening authority "considered" all ranks before making his selection, the actual composition of the court-martial panel is irrelevant.³⁴¹ The courts have reinforced the deference

given a convening authority in his selection process by according a presumption of regularity, legality, and good faith to the process.³⁴²

The Army Court of Military Review began to push this premise to its outer limits by distinguishing the improperly "handpicked" court in Hedges³⁴³ from a properly "handpicked" court in United States v. Carman.³⁴⁴ Carman involved a special court-martial panel composed of five lieutenant colonels and one major.³⁴⁵ Although the court recognized that "prejudice results when the composition of the court gives the appearance that a convening authority has 'handpicked' the members to favor the prosecution,"³⁴⁶ it found no prejudice in this case.³⁴⁷ When requesting nominees from the adjutant general's personnel records section, the staff judge advocate requested nominees from all the officer ranks and from all the enlisted ranks from E-9 down to and including E-5.³⁴⁸

When the list of nominees was presented to the convening authority, he was informed by the staff judge advocate of the criteria of Article 25(d)(2)³⁴⁹ and that

he could consider any person in the command.³⁵⁰ The court accepted this as evidence that the convening authority "considered" all ranks.³⁵¹ Furthermore, the court found the selection of high ranking officers consistent with Article 25(d)(2):

In today's Army, senior commissioned and noncommissioned officers, as a class, are older, better educated, more experienced, and more thoroughly trained than their subordinates. The military continuously commits substantial resources to achieve this. Additionally, those officers selected for highly competitive command positions in the Army have been chosen on the "best qualified" basis by virtue of many significant attributes, including integrity, emotional stability, mature judgment, attention to detail, a high level of competence, demonstrated ability, firm commitment to the concept of professional excellence, and the potential to lead soldiers, especially in

combat. These leadership qualities are totally compatible with the UCMJ's statutory requirements for selection as a court member.³⁵²

The court went even further in United States v. Cunningham, finding that the criteria of Article 25(d)(2) are virtually synonymous with the characteristics of a good commander.³⁵³ In Cunningham,

The stipulated testimony of the convening authority indicate[d] that duty assignment was a primary consideration in selecting court membership. He believed that commanders were most in touch with "what was going on" with soldiers and the command and most aware of the needs of the soldiers as well as commands, that qualification for command and court membership had much in common, that commanders were more concerned with caring for soldiers than punishing them and that he tried to select the fairest court he could.³⁵⁴

After citing favorably from Carman, the court held that "the preference for and intentional inclusion of those in leadership positions as court members [does] not invalidate the selection process."³⁵⁵

Carman and Cunningham marked the demise of any likelihood of a successful court packing challenge³⁵⁶ absent a showing of an inelastic attitude toward sentencing or other bias toward the accused.³⁵⁷ The courts have been similarly unimpressed with statistical evidence purporting to show a systematic exclusion of lower ranking personnel.³⁵⁸

In addition to allowing the deliberate inclusion of commanders, despite command not appearing as a criteria in Article 25(d)(2), the courts have been willing to accept other forms of deliberate inclusion. In Crawford the Court of Military Appeals held that the deliberate inclusion of a black member on the panel of the accused was not a violation of equal protection.³⁵⁹ Interestingly, the court noted that including a black member was designed to "[obtain] a fair representation of a substantial part of the community."³⁶⁰

Apparently, although the accused has no right to a representative cross-section of the community, and in fact Article 25 "contemplates that a court-martial panel will not be a representative cross-section of the military population,"³⁶¹ it is appropriate for the convening authority to consider this factor in making his selection. This is strange considering the courts' strong reliance on the phrase "best qualified" when it states that senior officers, senior enlisted persons, and commanders are natural selections based on the statutory criteria. At least the numerous attributes so diligently listed by the court in Carman have a logical relation to the six criteria specified in Article 25(d)(2).³⁶²

The desire to have a representative cross-section of the military community cannot be logically inferred from the criteria in Article 25(d)(2). Indeed, if one is to take the rationale of the court in Carman and Cunningham literally, the convening authority in Yager was derelict. He was derelict because, by instituting a system of random selection, he failed to adhere to

the statutory guidance to select those "best qualified."³⁶³

Regardless, the courts clearly feel it is the prerogative of the convening authority to consider attaining a representative cross-section of the community when selecting a panel. However, the convening authority must act in good faith.³⁶⁴ Where the convening authority sought to appoint females to the panel to achieve a representative cross-section of the community -- only in cases involving sex offenses -- the good faith requirement was not met.³⁶⁵

3. The Right to Have a Panel Selected Which is Free From Unlawful Command Influence

In 1955, the Air Force Board of Review first recognized that the involvement of a trial counsel in the court-martial panel member selection process can result in a violation of Article 37.³⁶⁶ In United States v. Cook, the staff judge advocate of Ellington Air Force Base prepared the request for appointment of court members for the same general court-martial that

he also requested the convening authority detail him to as trial counsel.³⁶⁷ The court found this to be a clear violation of Article 37.³⁶⁸

Since Cook, the courts have roundly condemned the practice of allowing trial counsel to have anything other than ministerial involvement in the panel selection process.³⁶⁹ While the courts have recognized for many years that the convening authority is entitled to have the assistance of staff and subordinate commanders in selecting court members,³⁷⁰ this area has caused a considerable amount of appellate activity in recent years.

In United States v. Marsh, the Court of Military Appeals clarified under what circumstances a judge advocate is precluded from involvement in the panel selection process.³⁷¹ In Marsh, the court noted that the trial counsel, in his role as a partisan advocate, can play no role in the selection process.³⁷² However, the court recognized that trial counsel perform several ministerial duties in relation to the selection process.³⁷³ These "ministerial responsibilities, such

as notifying members of the scheduled trial date and reporting matters concerning their availability to the convening authority" are not prohibited.³⁷⁴

Furthermore, the court refused to accept appellant's contention that the chief of the criminal law division is per se barred from making recommendations in the selection process.³⁷⁵

The court also rejected the contention that the staff judge advocate should not be involved in the panel selection process.³⁷⁶ While noting several comments from the appellate bench contending that the staff judge advocate and convening authority were prosecution oriented, the court stated:

Nonetheless, the Code has entrusted selection of court members to the convening authority, and military precedent has allowed the staff judge advocate to make recommendations for selection. In the absence of a particular showing of partisan advocacy, we cannot see why the staff judge advocate or a member of his staff, whatever his title, should

be per se excluded from making these recommendations.³⁷⁷

Less than two months after deciding Marsh, the court issued its opinion in United States v. McClain.³⁷⁸ McClain highlighted a staff judge advocate's panel member selection recommendations to his convening authority, which the court found to be "intended to exclude junior members because he [the staff judge advocate] believed they were more likely to adjudge light sentences."³⁷⁹ In finding that this conduct violated Article 37, the court ordered a rehearing on sentencing.³⁸⁰

In his concurring opinion,³⁸¹ Judge Cox reiterated that the convening authority should be given great deference and that normally the presumption of regularity will overcome an inference of impropriety.³⁸² Here, Judge Cox is constrained by the trial judge's finding that the staff judge advocate did, "as a matter of fact, . . . recommend[] selection based upon the concerns that the sentence might be too lenient."³⁸³ Constrained by this factual finding by the trial judge,

Judge Cox begrudgingly acknowledges the appropriateness of reversing the sentence, since there was no evidence that the convening authority did not follow this advice.³⁸⁴

This is odd, considering that the trial judge made the specific finding that the convening authority "adhered to the standards of Article 25 in making his selection, . . . and therefore I do not find that this selection was tainted or in violation of Article 25." ³⁸⁵ It is unclear, given the presumption of regularity accorded a convening authority, why Judge Cox feels compelled to accept the trial judge's finding of fact regarding the staff judge advocate,³⁸⁶ but not the convening authority. Apparently, if the staff judge advocate had improperly used his position to recommend nominees who he thought would be less lenient, but this motive was not revealed to the convening authority, the presumption of regularity would overcome the staff judge advocate's actions.³⁸⁷

The Court of Military Appeals rejected this extension of the convening authority's presumption of

regularity in United States v. Hilow.³⁸⁸ Hilow involved a situation where, unbeknown to the convening authority, a subordinate staff officer purposefully assembled nominees for court-martial duty "who were commanders and supporters of a command policy of hard discipline."³⁸⁹ The Army Court of Military Review had found a violation of Article 37 in the subordinate's actions, but had affirmed the conviction because "any taint . . . had clearly dissipated by the time of the convening authority's final selection of the members."³⁹⁰

The majority opinion of the Court of Military Appeals reversed, citing Greene as an example where a harmless error ruling was far more appealing, yet the court had reversed because it "w[as] simply not convinced that proper selection criteria were employed."³⁹¹ The court ordered a rehearing on sentencing because it found that, although appellant pleaded guilty and elected to be tried by a judge alone, there was no competent evidence to show that this decision was not made because of the composition of the panel.³⁹² In his partial dissent, Judge Cox

strongly condemned this aspect of the court's opinion, noting that the court should have required the appellant to claim, under oath, that his decision to be tried by judge alone was made because of the severity of the panel.³⁹³

The most recent example of command influence over the court-martial panel member selection process is United States v. Redman.³⁹⁴ In Redman, the convening authority chose a new court-martial panel to replace the standing panel when he became concerned because of "unusual results."³⁹⁵ Specifically, the convening authority was not satisfied with the sentences being adjudged by the panel because "'we were going through the court-martial process and we were winding up with Article 15 punishments.'"³⁹⁶

The convening authority made his decision to change the panel after consulting with his staff judge advocate, who informed him that:

[I]t would be permissible for him [the convening authority] to review the

qualifications of the members to insure himself as to whether he had, in fact, picked people that [sic] he believed to be best qualified, essentially viewing that as a continuing duty on his part as opposed to a one time matter.³⁹⁷

A subsequent investigation directed by the staff judge advocate, Eighth Army and conducted by a member of the trial judiciary found that the convening authority and staff judge advocate "reconstitute[d] the court-martial panels so as to achieve heavier sentences."³⁹⁸ This resulted in the Commander, Eighth Army, withdrawing the convening authority's courts-martial authority.³⁹⁹

Despite finding a violation of Articles 25 and 37,⁴⁰⁰ the court affirmed both the findings and sentence adjudged.⁴⁰¹ The court distinguished Redman from Hilow by noting that the appellant in Redman had been aware of the improper command influence and had waived it by accepting trial by the original court-martial panel.⁴⁰²

V. CONCLUSIONS

The process for selecting both juries and court-martial panels has changed considerably over time. Early juries such as the one that judged Orestes and the Roman Judex were the precursor to the modern era blue ribbon jury.⁴⁰³ The concept of random selection and the principle that a jury should be selected in a manner calculated to obtain a cross-section of the community have their roots in the Greek Heliaea.⁴⁰⁴ However, random selection and the cross-section requirement are relatively modern developments to the American jury selection process.⁴⁰⁵

Until recently, American jury pools were often not representative of a cross-section of the community. Although the jury venire was randomly selected, the jury pool was often determined using the "key man" system, coupled with subjective criteria such as those established by the Knox Committee in 1942 (intelligence, morality, integrity, and common sense).⁴⁰⁶ Within the last few decades, the Supreme Court has held that an accused has a fundamental right

to a jury selection procedure which seeks representation from a fair cross-section of the community.⁴⁰⁷ Since 1968, the federal courts have required random selection of both the jury pool and the jury venire as the means to guarantee that the cross-section requirement is met.⁴⁰⁸

As originally introduced in the United States, the court-martial panel member selection process was: (1) largely left to the discretion of the commander authorized to convene the court-martial; and (2) a dynamic process which changed frequently until the inception of the UCMJ in 1950. Initially, the only statutory conditions placed on a convening authority's power to convene a general court-martial under the Massachusetts Articles of War were: (1) that it be composed of not less than thirteen officers; and (2) that all members be at least the rank of major. Although the Articles of War of 1776 dropped the requirement that all members be at least the rank of major, this early preference for senior officers was to resurface over two centuries later.⁴⁰⁹

The original requirement that all general courts-martial be comprised of not less than thirteen officers was retained until 1786.⁴¹⁰ From 1786 until 1920, the Articles of War required thirteen-member general courts-martial unless the requirement would cause "manifest injury to the service" because of military exigencies.⁴¹¹ In 1920 the convening authority was given the first subjective criteria to utilize in the selection process.⁴¹² Article 4 of the Articles of War of 1920 directed the convening authority to appoint officers who, "in his opinion are best qualified for the duty by reason of age, training, experience, and judicial temperament."⁴¹³ This precursor to the Article 25(d)(2) criteria bears striking resemblance to the 1942 Knox Committee's criteria of intelligence, morality, integrity, and common sense.⁴¹⁴

The statutory basis for the court-martial panel member selection process has not changed much since 1950. The Uniform Code of Military Justice adopted provisions which were intended to both broaden the base of court-martial membership and eliminate unlawful

command influence.⁴¹⁵ Neither of these goals have been met.⁴¹⁶

Judicial opinions have steered convening authorities more and more toward selecting panels composed primarily of senior ranking officers and noncommissioned officers. The courts have done this while concomitantly assailing this practice when it has the intended purpose of attaining stiffer sentences.⁴¹⁷

By doing this, the courts are distinguishing between a "stacked panel" and a "blue ribbon panel." The former is impermissible since its selection is predicated on an intended result (stiffer punishment). The latter is not only acceptable, but laudatory, since it is predicated on the statutory criteria (age, education, experience, training, length of service, and judicial temperament).⁴¹⁸ "Best qualified" has been interpreted to mean considering commanders and senior personnel first.⁴¹⁹

The result is form over substance. Neither an accused nor the public can distinguish or appreciate

the difference between being hammered (receiving a stiff sentence) by a blue ribbon panel rather than being hammered by a stacked panel. In effect, we have reverted to a panel member selection process which is remarkably similar to the Roman Judex, with commanders and senior personnel representing the senatorial class of the military.⁴²⁰

Additionally, subordinate commanders and staff officers are utilized by the convening authority as "key men." They are instructed to nominate panel members, using the subjective criteria under Article 25(d)(2).⁴²¹ The result is a panel selected by the commander in much the same manner as the sheriff's jury in 14th century England.⁴²² A major difference is that the defendant faced with a sheriff's jury was allowed up to 35 peremptory challenges. The king's representative was allowed none, under the theory that the sheriff had selected the jury in his capacity as an agent of the crown.⁴²³ A military accused and the government are both entitled to a single peremptory.⁴²⁴ Essentially, the trial counsel has veto authority over one of the convening authority's selections. This is

odd, considering Professor Morgan's adamant opinion during the Code hearings that it was "unthinkable" that the Judge Advocate General be allowed to "dictate" to the commanding officer which members in his command would serve as court-martial panel members.⁴²⁵

Convening authorities are uniformly selecting senior members for courts-martial. Numerous cases have found that this was done to obtain stiffer sentences.⁴²⁶ Convening authorities have admitted that they selected senior members because they were tired of seeing "Article 15 punishment" and "unusual results" adjudged at courts-martial.⁴²⁷ Yet, in Nixon, Senior Judge Kucera categorically rejects the premise that panels composed of high ranking members have a higher propensity to return stiffer sentences.⁴²⁸

It is inexplicable how judges and convening authorities could have such radically different views of the sentencing proclivities of senior officers and noncommissioned officers. Who is correct? Convening authorities, as commanders who evaluate and interact with senior officers and noncommissioned officers on a

daily basis, should have a far better perspective of the sentencing philosophy of the personnel they select to sit as panel members than do judges.

With each case that comes before the courts, the judges register surprise at the actions taken by both convening authorities and staff judge advocates alike. Judge Cox summed up the appellate point of view when he stated:

The only concern the staff judge advocate should have had was fairness. Whether the sentence is lenient or harsh is subjective and properly the concern of: (1) the court-martial; and (2) the convening authority exercising clemency -- otherwise Congress would have authorized the convening authority to pick those members he thought most likely to award the harshest sentences. If staff judge advocates and convening authorities would carry out their pretrial and post-trial duties in accordance with the law and entrust what happens during the trial to the military judge

and the court-martial members, we would not have to resolve allegations of tampering with the outcome of the trial.⁴²⁹

Is this a fair criticism to level at convening authorities and staff judge advocates? It would be if the courts were sending a clear signal as to what was expected of convening authorities and staff judge advocates during the panel selection process. Unfortunately, the signal being transmitted is garbled and distorted. Two paragraphs before his general remonstrance of convening authorities and staff judge advocates, Judge Cox writes:

The deliberate selection or exclusion of a certain class of servicepersons for the purpose of increasing the severity of the sentence is wrong. A proper concern, however, is the selection of servicepersons who will adjudge a sentence that is fair and just, considering the circumstances of the case.⁴³⁰

This paragraph gives staff judge advocates and convening authorities nonsensical guidance similar to that given to Alice by many of the characters she encountered in her travels through Wonderland.⁴³¹ The first sentence reiterates the basic premise continuously espoused by the court -- the convening authority cannot select members to achieve stiffer sentences. The second sentence implies that it is appropriate for a convening authority to consider a nominee's sentencing philosophy.⁴³² This completely contradicts the underlying predicate of the first sentence -- that the panel member selection process cannot be subverted to a procedure designed to attain more severe sentences.

A convening authority may have an opinion as to what is a "fair and just" sentence that differs radically from that of Judge Cox. Consider the convening authority who personally has a Draconian sentencing philosophy. According to the second sentence of Judge Cox's guidance, that convening authority could justifiably appoint only like-minded Draconian members to sit on the panel. This would result in stiffer

sentences. Conversely, according to the first sentence of Judge Cox's guidance, a convening authority cannot select members to attain stiffer sentences. There is no functional difference in either approach since they both result in stiffer sentences. To suggest otherwise is to engage in semantic gymnastics.

Furthermore, if a convening authority can consider sentencing philosophy by "selecting servicepersons who will adjudge a sentence that is just and fair,"⁴³³ what prohibits a convening authority from evaluating a standing panel using the same criteria? Is it unreasonable for a convening authority to consider Article 25(d)(2) as a "continuing duty," as the convening authority did in Redman?⁴³⁴ We know from Redman that a convening authority cannot relieve a panel for meting out Article 15 punishments for serious offenses. Can a convening authority relieve a panel because the convening authority no longer feels the panel "will adjudge a sentence that is fair and just?"⁴³⁵

Certainly a staff judge advocate could read Judge Cox's opinion in McClain and believe that by closing the eyes, clicking the heels together three times and saying the magic words (fairness and justice), the convening authority can return to the wheat fields of Kansas (replace the panel).⁴³⁶ All will be fine as long as the convening authority does not allow bad thoughts (stiffer sentences) to enter his head. In addition, the courts have bestowed a protective envelope of appropriate command control over the convening authority's discretion. This has been done by according a presumption of regularity, legality, and good faith to the selection process.⁴³⁷ The obvious ambiguity in Judge Cox's concurring opinion in McClain encourages staff judge advocates and convening authorities to push the envelope of appropriate command control in the selection process while continuously repeating the magic words. This is precisely what the convening authority and staff judge advocate attempted to do in Redman.

The convening authority in Redman continuously insisted that he did not relieve the panel to achieve

stiffer sentences.⁴³⁸ Indeed, he repeatedly stated that his purpose was to "get more experienced people on the board [sic]"⁴³⁹ and to correct a "flagrant unfairness."⁴⁴⁰ Additionally, the staff judge advocate denied any desire to "obtain harsher sentences,"⁴⁴¹ claiming that the purpose was to "insure that what we were doing here was having fair trials by making sure that the convening authority had the best qualified members in his own mind."⁴⁴² Ironically, the staff judge advocate acknowledged Judge Cox's guidance when he said, "I know from looking, for instance, at the McClain case that the purpose in what the SJA does something for [sic] is important and there's no getting around that."⁴⁴³

What if the commander in Redman had simply not referred any cases to court-martial until after the panel's term of detail expired? What does this tell convening authorities? Should the courts be surprised to see future convening orders with open ended dates?

As long as we encourage blue ribbon panels while condemning stacked panels we will continue to see

creative staff judge advocates and convening authorities. As long as we encourage convening authorities and staff judge advocates to push the envelope of appropriate command control over the selection process we will have a few who go over the edge.

The root of the problem does not lie in invidious and sinister staff judge advocates and convening authorities. Indeed, the convening authorities and staff judge advocates in both McClain and Redman were not attempting to influence a particular case. They were attempting to influence all cases. On its face, that sounds worse. Is it?

In Redman the convening authority was concerned with the effect the panel was having on his remaining 14,000 good soldiers in the division.⁴⁴⁴ As the commander, he is responsible for everything his troops do and fail to do. He is responsible for the administration of military justice within his command. He has the responsibility to ensure that all infractions are handled appropriately, justly, and fairly.⁴⁴⁵

If a soldier is court-martialled and receives a severe sentence, the convening authority has the authority, inter alia, to remit, suspend or mitigate any portion of that sentence.⁴⁴⁶ The convening authority not only has the authority, but as the commander he has the duty to do so when the sentence is too severe. To do otherwise would be to allow injustice. On the other hand, when a soldier receives "Article 15 punishment" from a court-martial panel for a serious offense, the commander can do nothing. Both of these cases affect the morale and discipline of the command. Perhaps one "unusual result" will not break down unit cohesion, but a pattern certainly will.

Discipline is bred from training and maintained with the fair administration of justice. Obedience is the result of discipline, and "there is nothing in War which is of greater importance than obedience."⁴⁴⁷ If a commander is powerless to ensure that justice is administered fairly and justly throughout his command, his command will be useless as a fighting force.⁴⁴⁸

Both convening authorities in McClain and Redman asked their respective staff judge advocates whether the action they took was permissible under the UCMJ. This clearly reflects that, while convening authorities will not "knowingly and intentionally"⁴⁴⁹ violate Article 37,⁴⁵⁰ they will do anything they can to ensure that the system administers justice fairly. The reason they feel compelled to do so is because there is no built in equanimity control valve in our system of court-martial sentencing.

It is perfectly acceptable in our system for two co-accused with equal levels of culpability to receive two radically different sentences. If the sentences are too severe, the convening authority has a control valve. The convening authority has the authority, inter alia, to remit, suspend, or mitigate that portion of the sentence which is too severe.⁴⁵¹ However, that control valve only flows in one direction. If the sentences are too lenient, the convening authority is powerless.

Commanders are deeply imbued with a sense of responsibility for the administration of justice. Before General Order No. 88 in 1919, a convening authority dissatisfied with either the findings or sentence adjudged could return a panel for deliberations.⁴⁵² As convening authority, the commander still has power over the composition of the court. Under the present system, the only way the commander can ensure that justice is administered fairly to all members of the unit is to ensure that, as convening authority, only members who share the commander's sentencing philosophy are selected to serve on panels. The convening authority must select a panel which is the alter ego of the commander. The convening authority must do this to ensure that fairness is achieved "in his opinion" -- not to increase the sentences adjudged.

This convoluted process will result in continued criticism from the public for using blue ribbon panels. We must not only be fair and impartial; we must be perceived to be fair and impartial. Without a positive public opinion of our system of military justice we

will not have a positive public opinion about our armed forces. Without a positive public opinion about our armed forces we have no national will. Without national will we cannot expect to succeed in a protracted war.⁴⁵³

As noted earlier, our system of court-martial panel member selection is "the major difference between military and civilian practice."⁴⁵⁴ Judge Cox recognized the quandary the convening authorities are in when he noted in his concurring opinion in Smith:

Those responsible for nominating court members should reflect upon the importance of this task. It is a solemn and awesome responsibility and not one to be taken lightly or frivolously. It is a responsibility that Congress has entrusted to convening authorities and has not required some other method of selection, such as random choice. Even so, it is the most vulnerable aspect of the court-martial system; the easiest for critics to attack. A fair and impartial

court-martial is the most fundamental protection that an accused service member has from unfounded or unprovable charges. There is a duty to nominate only fair and impartial members.⁴⁵⁵

The true beauty of our system of panel member selection is that it is statutory, subject to few constitutional constraints, and therefore highly adaptable to changing needs. Before 1950, the court-martial panel member selection process was a dynamic one, subject to frequent change. At the time of the enactment of the UCMJ, the criteria under Article 25(d)(2)⁴⁵⁶ were consistent with the model criteria for federal jury selection espoused by the Knox Committee.⁴⁵⁷ However, where the federal process for jury selection has remained dynamic and has adapted to reflect the principle of a representational cross-section of the community by using random selection, the court-martial panel member selection process has become static and is mired in a 1950's time warp.

Although there is no constitutional requirement to change our system of court-martial panel member selection, whenever we can adapt military justice to conform to current norms in the federal criminal justice system, it is in our best interests to do so. Public opinion is a critical component of national will, without which no military can effectively prosecute a war. Although the federal system, with its random selection of both the jury pool and the jury venire is not feasible for operational reasons, we can and should implement a procedure that seeks to obtain a representational cross-section of the military community in court-martial panels.

VI. RECOMMENDATIONS

Although each recommendation will be addressed separately, each recommendation is interrelated. No single recommendation or group of recommendations has any merit standing alone. The recommended draft amendments to the applicable UCMJ articles can be found in the appendix.

The goal of these recommendations is to attain a process which seeks a representational cross-section of the community for panel membership. Random selection is advocated for the actual selection of the panel, but not for the selection of the pool of nominees.⁴⁵⁸ Random selection of the nominee pool is not recommended for two reasons. First, random selection of the nominee pool is not necessary to ensure a process which meets the representational cross-section requirement. Even the federal jury selection system recognizes that random selection is merely a means to achieve a goal; random selection is not a goal in and of itself.⁴⁵⁹ Second, random selection of the nominee pool is not feasible for operational considerations. Only the commander can determine whether a service member is available for duty. This aspect of military service is tacitly recognized by the fact that active duty military members are barred from federal jury service.⁴⁶⁰

A. ELIMINATE THE VARIABLE NUMBER
OF MEMBERS WHO SIT ON COURTS-MARTIAL

First, we should change the number of members on each court-martial to six for general courts-martial and three for special courts-martial. The variable number of members on courts-martial adversely impacts the selection process at the voir dire/challenge stage of the proceedings. A specified number of members would remove any incentive on the part of either defense counsel or trial counsel to play the numbers game with peremptory challenges. This feature of our system denigrates the solemnity of the court-martial and reduces the voir dire to a carnival atmosphere where counsel can play the odds.

By removing the incentive to preempt someone for absolutely no reason other than percentages it would alleviate many Batson/Santiago-Davila issues.⁴⁶¹ Although the variable number of members endemic to our system of courts-martial has survived both due process and equal protection challenges, it serves no functional purpose. Since we require a two-thirds vote

for any conviction, the number of members should be divisible by three: thus six for a general court-martial and three for a special court-martial.

B. REPEAL SUBJECTIVE CRITERIA
UNDER ARTICLE 25(d)(2)

Second, completely repeal the selection criteria presently found under Article 25(d)(2). Instead of selecting members, the convening authority should become the individual responsible for nominating members; however, the sole criterion for nomination should be expected availability due to mission requirements and operational readiness. The convening authority should be required to nominate all ranks excluding general officers, second lieutenants, warrant officers (WO-1), and privates (E-1 through E-3). Those specified ranks should not be eligible for court membership. This is consistent with the rationale in Yager.⁴⁶²

In addition, the convening authority should be required to nominate an equal number of nominees by

rank. This provision is designed to attain a representational cross-section of the military community/command in the nominee pool. An exception could be granted by the respective Judge Advocate General in units where the rank structure was so top heavy that senior ranks actually outnumbered junior ranks. This is hard to imagine at the general court-martial convening authority level, but is possible at the special court-martial level.

C. REPEAL RIGHT TO AN ENLISTED PANEL

Third, repeal that portion of Article 25(c)(1) which allows an enlisted person to request a court-martial panel comprised of at least one-third enlisted members. Under this proposal, an enlisted person would be surrendering the "guarantee" of a panel of one-third enlisted members for a system which seeks a representational cross-section of the military community/command for the nominee pool and utilizes random selection for the selection of the panel. Although it is not completely random, it does guarantee at least equal representation of eligible enlisted

persons in the member nominee pool. Under the present proposal, it is certainly possible for an accused to face either an all-enlisted or an all-officer panel, although this is statistically improbable.

D. ESTABLISH A NEUTRAL PANEL
COMMISSIONER AND RANDOMLY SELECT PANEL

Fourth, the convening authority should be required to detail a panel commissioner. The panel commissioner should be either a member of the trial judiciary, a duly certified inspector general, or other individual with the approval of the Judge Advocate General. The convening authority would submit all nominees to the panel commissioner. The panel commissioner would then select members for courts-martial by a method of random selection.

Upon receiving notification of a referral, the panel commissioner would draw the members required for the respective court-martial. Members would sit for only one court-martial.⁴⁶³ Once an individual is selected, whether he actually sits on a court-martial or is

excused, he would be removed from the panel member pool. This would ensure that panel member duty does not fall on a small portion of the military community/command, thereby concurrently ensuring a representational cross-section within the nominee pool. An additional benefit of this provision is it would eliminate any future issue involving the premature relief of a panel.

The panel commissioner would draw four alternates for a general court-martial and three alternates for a special court-martial. The convening authority or military judge could direct that more alternates be drawn if a need was anticipated in a given case. The selection should be open and public. The panel commissioner or his representative would be responsible for notifying court members and their commanders of the date, uniform, time, and location of the court-martial.

Once selected by the panel commissioner, no member could be excused unless by the panel commissioner or the military judge. The panel commissioner will excuse any member when any convening authority certifies in

writing that excusal is necessary for mission requirements, operational necessity, or personal hardship. The next alternate in order of drawing will become a member and the panel commissioner will draw an additional alternate.

E. SEAT BOTH PRIMARY AND ALTERNATE
MEMBERS DURING VOIR DIRE

Fifth, the military judge will seat all members and alternates during the first session with members. All members and alternates will be subject to voir dire. The trial counsel and defense counsel will each receive one peremptory challenge. After all challenges have been ruled on by the military judge, excused members will be replaced by alternates in the order selected by the panel commissioner. If a quorum is not present, the military judge will recess until the panel commissioner provides additional alternates.

The military judge may, at his discretion, require alternates to be seated with the panel during the proceedings. Alternates will not take part in

deliberations until and unless they are required to replace members. After arraignment, only the military judge can excuse a member.

F. ESTABLISH MINIMUM SENTENCES

Finally, military sentencing guidelines should be enacted.⁴⁶⁴ Sentencing guidelines should specify minimum sentences for each offense under the Code. The panel should never be informed of the minimum sentence. The military judge would determine and announce the minimum sentence after findings, in open court, with the members absent. After sentencing evidence and argument by counsel, the panel would deliberate on a sentence.

Any sentence which was lower than the minimum sentence would be a recommendation to the convening authority. Sentences adjudged by the panel which exceed the minimum sentence would become the upper limit of punishment the convening authority could approve. In all cases, the convening authority could approve at least the minimum sentence. This proposal

would ameliorate the impact of a panel that adjudged "Article 15 punishment" for serious offenses.

Minimum sentences are necessary to eliminate the incentive the convening authority now has to manipulate the system. They are also essential to ensure fairness from a systemic perspective. Minimum sentences would be the two-way equanimity control valve and would allow the convening authority, as suggested by Judge Cox, to "entrust what happens during the trial to the military judge and the court-martial members."⁴⁶⁵

These recommendations are designed to bring military justice in line with the federal system of criminal justice. If instituted, they will implement a panel selection system which will seek a fair representational cross-section of the military community while concomitantly reducing a convening authority's incentive to exert influence over the system.⁴⁶⁶

NOTES

¹ Thomas Jefferson, First Inaugural Address (March 4, 1801), reprinted in 3 The Writings of Thomas Jefferson, Official Papers, at 321-22 (Albert E. Bergh, ed., 1907) (1905).

² See infra part IV.A.

³ See infra part IV.A-B.

⁴ Joseph W. Bishop, Jr., Justice Under Fire 27 (1974) [hereinafter Bishop].

⁵ See, e.g., Phyllis W. Jordan, Navy Justice: a conflict of interest?, Va. Pilot, Sep. 22, 1991, at A1, A8 ("Commanding officers can decide . . . who may sit on the military jury. The jurors and witnesses are invariably under his command, creating opportunities for subtle or sometimes blatant and unlawful pressure.").

⁶ 10 U.S.C. §§ 801-940 (1988) [hereinafter cited in text and notes as UCMJ or Code].

⁷ See 28 U.S.C. §§ 1861-1878 (1988).

⁸ See infra part IV.B.

⁹ Standards for Criminal Justice Standard 15, Trial by Jury (A.B.A. 2d ed., 1986 Supp.) [hereinafter ABA Standards].

¹⁰ Lloyd. E. Moore, The Jury 1 (1973) [hereinafter Moore].

¹¹ Id.

¹² Id.

¹³ Will Durant, The Life of Greece 110 (1939) [hereinafter Durant, Greece].

¹⁴ Id.

¹⁵ Moore, supra note 10, at 2.

¹⁶ Durant, Greece, supra note 13, at 116.

¹⁷ Moore, supra note 10, at 2.

¹⁸ Id.

¹⁹ Id.

²⁰ Id.

²¹ Durant, Greece, supra note 13, at 116.

²² John Profatt, Trial by Jury 6 (1877) [hereinafter Profatt].

²³ Moore, supra note 10, at 2.

²⁴ Profatt, supra note 22, at 6-7.

²⁵ Moore, supra note 10, at 3.

²⁶ Id.

²⁷ Id.; Profatt, supra note 22, at 8; Robert von Moschzisker, Trial by Jury 12 [hereinafter Moschzisker].

²⁸ Durant, Caesar and Christ 114 (1944) [hereinafter Durant, Caesar].

²⁹ Id. at 116, 126.

³⁰ Moore, supra note 10, at 3.

³¹ Durant, Caesar, supra note 28, at 403.

³² Id.

³³ Id.

³⁴ Moore, supra note 10, at 3; Moschzisker, supra note 27, at 12.

³⁵ Moore, supra note 10, at 3.

³⁶ The Romans did not employ public prosecutors, allowing private citizens to prosecute each other. See Durant, Caesar, supra note 28, at 403.

³⁷ Moore, supra note 10, at 3.

³⁸ Profatt, supra note 22, at 9.

³⁹ Durant, Caesar, supra note 28, at 178.

⁴⁰ Moore, supra note 10, at 3.

⁴¹ Profatt, supra note 22, at 41. There has been some written reference to a jury system existing amongst the Triads of Dyneval Moelmud (what is now Wales) circa 450 B.C. Additionally, King Morgan Mwynvawr of Glamorgan (also in Wales) appointed twelve men to hear cases at

his request in the sixth century A.D. See generally Charles P. Daly, The Common Law 61-66 (1894).

⁴² See Moore, supra note 10, at 23-45; Profatt, supra note 22, at 15-62; Moschzisker, supra note 27, at 23-62. Trial by ordeal involved the accused undergoing a test administered by clergy to determine guilt. A popular test was to grasp a rock from a pot of boiling water. If, after three days the hand was not infected, the accused was deemed not guilty. Moore, supra note 10, at 31. Trial by compurgation involved an accused bringing forth witnesses to attest to their belief that an accused was truthful in his denial of wrongdoing. Generally, twelve freemen were required, although an earl was viewed as equivalent to six freemen. Id. at 29-30. Trial by combat involved the accused challenging his accuser to mortal combat, the outcome of which determined culpability. The accused was given the option to determine the type of trial he desired to forego. Id. at 36, 44.

⁴³ Profatt, supra note 22, at 41.

⁴⁴ See Moore, supra note 10, at 42; Moschzisker, supra note 27, at 26-27. Freeman were men entitled to own land. Freeman were further divided into earls and churls. Earls were considered noblemen and valued at a rate of one to six in relation to churls in resolving legal disputes. Moschzisker, supra note 27, at 26-27.

⁴⁵ Moore, supra note 10, at 54-55.

⁴⁶ Id.

⁴⁷ Id.

⁴⁸ See id. at 49-57. It is generally believed that the Magna Charta, issued by King John on June 15, 1215, guaranteed trial by jury. The number twelve was originally the number of the accusing jury, the forerunner of the grand jury. These members were comprised exclusively of knights and other predominant noblemen. The trial jury, or petit jury, came to be numbered at twelve as a result of the practice of the accusing jury. Members of the accusing jury were often also placed on the trial jury. Id.

⁴⁹ Id. at 55-58.

50 Id.

51 Id.

52 Id.

53 Id.

54 Id.

55 Id. at 68.

56 Id.

57 Id. at 69.

58 Id. at 97.

59 Id.

60 See id. at 72-76; Profatt, supra note 22, at 57-60.

The Star Chamber trials were a series of decisions by a court appointed by the Crown which overturned numerous jury decisions. More importantly, jurymen who were found to have decided against what the court deemed to be the weight of evidence were often punished with

finer and imprisonment. Moore, supra note 10, at 72-76.

⁶¹ Penn and Mead's Case, 6 How. State Tr. 951 (1670). William Penn was tried at Old Bailey in 1670 for the offenses of unlawful assembly and disturbance of the peace by preaching and speaking to an assemblage at the Parish of St. Bennet Grace-Church. After returning a guilty verdict for "speaking," the court refused to dismiss the jury until it had returned a proper verdict, to include the words "unlawful assembly." After several instructions by the judge and subsequent obdurate refusals to comply by the jury, the jury finally returned a verdict of not guilty to all charges. The jury was fined 40 marks each and Penn was fined for contempt. Bushell, the jury foreman, filed a writ of habeas corpus since he was imprisoned for refusal to pay the fine. Chief Justice Baughan ordered Bushell's release and held that juries were not to be punished for returning a verdict not consistent with the court's instructions. Moore, supra note 10, at 86-89; Profatt, supra note 22, at 56.

⁶² U.S. Const. art. III, sec. 2, cl. 3, states --

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crime shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Id.

⁶³ U.S. Const. amend. V and VI provide, in part --

Amendment V -- No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger

Article VI -- In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have previously been ascertained by law, and to be informed of the nature of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense.

Id.

⁶⁴ U.S. Const. amend. VII provides that --

Amendment VII - In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United

States, than according to the rules of the common law.

Id.

⁶⁵ See, The Federalist No. 83 (Alexander Hamilton) (Clinton Rossiter, ed., 1961) (arguing against the need for a Constitutional amendment protecting the right to a jury trial in civil cases).

⁶⁶ Id. at 499.

⁶⁷ Duncan v. Louisiana, 391 U.S. 145 (1968).

⁶⁸ Williams v. Florida, 399 U.S. 78 (1970) (holding that a six person jury was sufficient in all but capital cases and referring to the federal twelve-member jury as "a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance."); Johnson v. Louisiana, 406 U.S. 356 (1972) (upholding 9-3 vote for conviction); Apodaca v. Oregon, 406 U.S. 404 (1972) (upholding 10-2 vote for conviction).

⁶⁹ See, 28 U.S.C. §§ 1863, 1864 (1988).

⁷⁰ U.S. Const. amend. VI.

⁷¹ See, e.g., Taylor v. Louisiana, 419 U.S. 522 (1975) (testing for systematic exclusion of significant, distinct group in community to determine whether fair cross-section requirement was met).

⁷² Id.; Batson v. Kentucky, 476 U.S. 79 (1986) (applying cross-section requirement to peremptory challenge of black; requiring prosecutor to provide racially neutral explanation for peremptory challenge).

⁷³ William C. Mathes & Edward J. Devitt, Federal Jury Practice and Instructions 1-5 (1965) [hereinafter Mathes & Devitt]. See also ABA Standards, supra note 9, at 15.32-15.36.

⁷⁴ Mathes & Devitt, supra note 73, at 1-5.

⁷⁵ Id.

⁷⁶ Id. at 1.

⁷⁷ Id. at 5.

⁷⁸ Id.

⁷⁹ 28 U.S.C. §1863 (1964) (amended 1968, 1972, 1978, 1988); 28 U.S.C. §1864 (1964) (amended 1968, 1988).

⁸⁰ 28 U.S.C. § 1861 (1988).

⁸¹ 28 U.S.C. § 1865 (1988).

⁸² 28 U.S.C. § 1863(b)(5)(B) (1988).

⁸³ 28 U.S.C. § 1863(b)(6) (1988).

⁸⁴ 28 U.S.C. § 1863(b)(5)(A) (1988).

⁸⁵ 28 U.S.C. § 1862 (1988).

⁸⁶ 28 U.S.C. §§ 1863(a), 1861, 1862 (1988).

⁸⁷ 28 U.S.C. § 1863(a) (1988).

⁸⁸ 28 U.S.C. § 1863(b)(2) (1988).

⁸⁹ 28 U.S.C. § 1863(b)(4) (1988).

⁹⁰ 28 U.S.C. § 1863(b)(1) (1988).

⁹¹ The historical background of the court-martial panel is restricted in this article to land forces. See generally Edward M. Byrne, Military Law 2-6 (3d ed.

1981), for a synopsis of the origins of naval military law. Until the passage of the Uniform Code of Military Justice in 1950 (64 Stat. 198), the United States Navy operated under first the Rules for the Regulation of the United Colonies in 1775 and later the Articles for the Government of the Navy. Both of these documents had similar provisions for courts-martial to that of the Articles of War. Id. See infra part III.C.1-3 for a discussion pertaining to the early development of the court-martial in the United States Army.

⁹² William Winthrop, Military Law and Precedents 45 (2d ed. 1920 reprint) [hereinafter Winthrop]; David A. Schlueter, Military Criminal Justice: Practice and Procedure 12 (2d Ed. 1987) [hereinafter Schlueter].

⁹³ Winthrop, supra note 92, at 45; Schlueter, supra note 92, at 12.

⁹⁴ Schlueter, supra note 92, at 13.

⁹⁵ Winthrop, supra note 92, at 45.

⁹⁶ Winthrop, supra note 92, at 18; Schlueter, supra note 92, at 13.

⁹⁷ Winthrop, supra note 92, at 46.

⁹⁸ Schlueter, supra note 92, at 13.

⁹⁹ Id. at 16; Winthrop, supra note 92, at 46.

¹⁰⁰ Schlueter, supra note 92, at 14-15.

¹⁰¹ Id.

¹⁰² Id.

¹⁰³ Id. at 19.

¹⁰⁴ Id.

¹⁰⁵ English Military Discipline (1686), reprinted in
Winthrop, supra note 92, at 919.

¹⁰⁶ Id.

¹⁰⁷ Id.

¹⁰⁸ Id.

¹⁰⁹ 1 William & Mary, c. 5, reprinted in Winthrop, supra
note 92, at 929-30.

¹¹⁰ Id.

¹¹¹ Id.

¹¹² Id.

¹¹³ Id.

¹¹⁴ Id.

¹¹⁵ Schlueter, supra note 92, at 21.

¹¹⁶ The Massachusetts Articles of War, reprinted in Winthrop, supra note 92, at 947-52.

¹¹⁷ Schlueter, supra note 92, at 22.

¹¹⁸ The British Articles of War of 1765, reprinted in Winthrop, supra note 92, at 941-46.

¹¹⁹ The British Articles of War of 1765, Section XV, Articles I-V, reprinted in Winthrop, supra note 92, at 942.

¹²⁰ Id.

¹²¹ British Articles of War of 1765, Section XV, Article IX, reprinted in Winthrop, supra note 92, at 943.

¹²² Id.

¹²³ The Massachusetts Articles of War, Article 32, reprinted in Winthrop, supra note 92, at 950.

¹²⁴ Massachusetts Articles of War, Article 37, reprinted in Winthrop, supra note 92, at 950.

¹²⁵ Id.

¹²⁶ American Articles of War of 1776, reprinted in Winthrop, supra note 92, at 961-71.

¹²⁷ Articles of War of 1776, Section XIV, Article 1, reprinted in Winthrop, supra note 92, at 967.

¹²⁸ American Articles of War of 1776, Section XIV, Article 7, reprinted in Winthrop, supra note 92, at 968.

¹²⁹ American Articles of War of 1786, reprinted in Winthrop, supra note 92, at 972-975.

¹³⁰ American Articles of War of 1786, Article 1, reprinted in Winthrop, supra note 92, at 972. The Rules and Regulations for the Government of the United States Navy had a similar provision allowing for a five-member general court-martial when sufficient

officers could not be obtained. The Navy rules provided for only the general court-martial; no lower form of court-martial was authorized. The Rules and Regulations of the United States Navy, 23 April 1800, Art. XXXV, reprinted in James E. Valle, Rocks and Shoals 285, 291 (1980).

¹³¹ American Articles of War of 1786, Article 3, reprinted in Winthrop, supra note 92, at 972.

¹³² Id.

¹³³ American Articles of War of 1786, Art. 11, reprinted in Winthrop, supra note 92, at 973.

¹³⁴ American Articles of War of 1806, Articles 64-66, 75, reprinted in Winthrop, supra note 92, at 982-83. The Articles of War of 1806 did not alter the composition of courts-martial. Id.

¹³⁵ An Act to organize Military Courts to attend the Army of the Confederate States in the field and to define the Powers of said Courts, reprinted in Winthrop, supra note 92, at 1006-07.

¹³⁶ Id.

¹³⁷ Id.

¹³⁸ American Articles of War of 1874, reprinted in
Winthrop, supra note 92, at 986-96.

¹³⁹ American Articles of War of 1874, Articles 62, 80,
reprinted in Winthrop, supra note 92, at 991, 993.

¹⁴⁰ Id.

¹⁴¹ The Act of October 1, 1890, Establishing the Summary
Court, reprinted in Winthrop, supra note 92, at 999.

¹⁴² Id.

¹⁴³ Id.

¹⁴⁴ Articles of War of 1916, Art. 3, reprinted in War
Department Committee on Education and Special Training,
A Source-Book of Military Law And War-Time Legislation
8-33 at 10 (West 1919) [hereinafter A Source-Book].

¹⁴⁵ Articles of War of 1916, Art. 4, reprinted in A
Source-Book, supra note 144, at 11.

¹⁴⁶ Articles of War of 1916, Arts. 5-7, reprinted in A Source-Book, supra note 144, at 11.

¹⁴⁷ Articles of War of 1916, Arts. 8-10, reprinted in A Source-Book, supra note 144, at 11.

¹⁴⁸ Articles of War of 1916, Art. 5, reprinted in A Source-Book, supra note 144, at 11.

¹⁴⁹ Manual for Courts-Martial, United States, 1917, para. 7(a).

¹⁵⁰ Id.

¹⁵¹ See infra part IV.B.3. for a discussion pertaining to the reaction of the court to a convening authority who improperly relieved a standing court-martial panel to achieve harsher sentences. United States v. Redman, 33 M.J. 679 (A.C.M.R. 1991).

¹⁵² See Walter T. Cox III, The Army, the Courts, and the Constitution: The Evolution of military Justice, 118 Mil. L. Rev. 1 (1987) [hereinafter, Cox]. See generally Terry W. Brown, The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell, 35 Mil L.

Rev. 1 (1967); Frederick Bernays Wiener, The Seamy Side of the World War I Court-Martial Controversy, 123 Mil. L. Rev. 109 (1969).

¹⁵³ See Schlueter, supra note 92, at 30. Perhaps the most significant change was General Order No. 88, which required a convening authority to accept the findings of not guilty of a court-martial panel. Previously, it was accepted practice for a convening authority to return a panel for deliberations when he did not agree with their findings. Gen. Orders No. 88, War Department (14 Jul. 1919).

¹⁵⁴ The Articles of War of 1920, Arts. 4-7, reprinted in Manual for Courts-Martial, United States, 1921, app. 1, at 494 [hereinafter MCM, 1921].

¹⁵⁵ Articles of War of 1920, Art. 5, reprinted in MCM, 1921, app. 1, at 494.

¹⁵⁶ Id.

¹⁵⁷ Articles of War of 1920, Art. 6, reprinted in MCM, 1921, app. 1, at 494.

¹⁵⁸ Articles of War of 1920, Art. 7, reprinted in MCM, 1921, app 1, at 494.

¹⁵⁹ Articles of War of 1920, Art. 8, reprinted in MCM, 1921, app. 1, at 495.

¹⁶⁰ MCM, 1921, para. 7(a) n.1.

¹⁶¹ Id.

¹⁶² Articles of War of 1920, Art. 4, reprinted in MCM, 1921, app. 1, at 494.

¹⁶³ MCM, 1921, para. 6(c) n.1.

¹⁶⁴ MCM, 1921, para. 6(c) n.2.

¹⁶⁵ Cox, supra note 152, at 11.

¹⁶⁶ See Walter T. Generous, Jr., Swords and Scales, 14-21 (1973) [hereinafter Generous].

¹⁶⁷ Cox, supra note 152, at 12.

¹⁶⁸ Armed Services Comm., Subcommittee Hearings on H.R. 2575, to Amend the Articles of War, 80th Cong., 1st Sess. 2002 (1947).

¹⁶⁹ Id.

¹⁷⁰ Id.

¹⁷¹ Elston Act, 62 Stat. L. 604, 627-44 (1948).

¹⁷² The Articles of War of 1948, reprinted in Manual for Courts-Martial, United States, 1949, app. 1, at 273 [hereinafter MCM, 1949].

¹⁷³ The Articles of War of 1948, Article 4, reprinted in MCM, 1949, app. 1, at 275-76.

¹⁷⁴ Id.

¹⁷⁵ Generous, supra note 166, at 28.

¹⁷⁶ Robert L. Sonfield, A Guide for the Administration of Military Justice 25 (1945). Paragraph 61 states in part:

Theoretically the charges and allied papers are referred to the officer exercising general court-martial jurisdiction. He then refers such charges to his Staff Judge Advocate for appropriate

recommendations and the Staff Judge Advocate thereafter makes his recommendations to his commanding officer. However, as a matter of practical application, when the charges are received at the headquarters of such officer, they are referred directly to the Staff Judge Advocate for appropriate action. It is customary in many commands for the commanding officer to permit the Staff Judge Advocate to make the decision with respect to each case and refer it for trial by General Court-Martial, inferior court-martial or take such other appropriate action as in his judgement may be deemed proper.

Id.

At the time this was written, Lieutenant Colonel Sonfield was the staff judge advocate of the Infantry School at Fort Benning, Georgia. Id. at 1.

¹⁷⁷The Articles of War of 1948, Article 88, reprinted in MCM, 1949, app. 1, at 296.

¹⁷⁸ Generous, supra, note 166, at 31-33.

¹⁷⁹ See id. at 34-53 for an excellent recounting of the workings of the Morgan Committee.

¹⁸⁰ UCMJ, 64 Stat. 198 (1950) (codified as amended at 10 U.S.C. §§ 801-940 (1988)).

¹⁸¹ Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcommittee of the Committee of Armed Services, House of Representatives, 81st Cong., 1st Sess. 715-31 (1949) [hereinafter Hearings on H.R. 2498] (statement of George A. Spiegelberg, Chairman of the Special Committee on Military Justice of the American Bar Association) ; Uniform Code of Military Justice: Hearings on S. 857 and H.R. 4080 Before a Subcommittee of the Committee on Armed Services, United States Senate, 81st Cong., 1st Sess. 60-85 (1949) (statement of George A. Spiegelberg, Chairman of the Special Committee on Military Justice of the American Bar Association).

¹⁸² Hearings on H.R. 2498, supra note 181, at 717-23.

¹⁸³ Id. at 719.

¹⁸⁴ Id. at 723.

¹⁸⁵ Id. at 717-23.

¹⁸⁶ Id. (statement of Col. Frederick Bernams [sic] Wiener, Washington, D.C.) at 782-83.

¹⁸⁷ UCMJ art. 22, 10 U.S.C. § 822 (1958) (amended 1986) (1988); UCMJ art. 23, 10 U.S.C. § 823 (1958) (1988); UCMJ art. 24, 10 U.S.C. § 824 (1958) (1988).

¹⁸⁸ UCMJ art. 25, 10 U.S.C. § 825 (1958) (amended 1968, 1983, 1986) (1988).

¹⁸⁹ Id.

¹⁹⁰ UCMJ art. 25(c)(1), 10 U.S.C. § 825(c)(1) (1958) (amended 1968, 1986) (1988).

¹⁹¹ UCMJ art. 25(d)(2), 10 U.S.C. § 825(d)(2) (1958) (1988).

¹⁹² Id.

¹⁹³ Id. Previously, investigating officers and counsel were not statutory grounds for a challenge but were recognized as grounds for a causal challenge. MCM, 1949, para. 58e.

¹⁹⁴ UCMJ art. 25(d)(1), 10 U.S.C. § 825(d)(1) (1958) (1988).

¹⁹⁵ UCMJ art. 26, 10 U.S.C. § 826 (1958) (amended 1968, 1983) (1988).

¹⁹⁶ Id.

¹⁹⁷ UCMJ art 26(a), 10 U.S.C. § 826(a) (1958) (amended 1968, 1983) (1988).

¹⁹⁸ UCMJ art. 26(b), 10 U.S.C. § 826(b) (1958) (amended 1968) (1988).

¹⁹⁹ UCMJ art. 37, 10 U.S.C. § 837 (1958) (amended 1968) (1988); UCMJ art. 98, 10 U.S.C. § 898 (1958) (1988).

²⁰⁰ UCMJ art. 37, 10 U.S.C. § 837 (1958) (amended 1968) (1988).

²⁰¹ UCMJ art. 98(2), 10 U.S.C. § 898(2) (1958) (1988).

²⁰² 82 Stat. 1335 (1968).

²⁰³ 97 Stat. 1400 (1983).

²⁰⁴ In 1968 Articles 16 and 26 were amended, changing the law officer to military judge and allowing for trial by military judge alone in both general and special courts-martial. In this sense the accused was offered a completely new option of whether to be tried by a panel or by judge alone. UCMJ art. 16, 10 U.S.C. § 816 (1958) (amended 1968, 1983) (1988); UCMJ art. 26, 10 U.S.C. § 826 (1958) (amended 1968, 1983) (1988). Art 25 was also amended in 1983 to include a provision allowing the convening authority's staff judge advocate, legal officer or principal assistant to excuse a member before the court-martial is assembled, subject to the delegation by the convening authority and service regulations. UCMJ art. 25(e), 10 U.S.C. Sec. § (1958) (amended 1983) (1988).

²⁰⁵ The Military Justice Act of 1982: Hearings on S. 2521 Before the Subcommittee on Manpower and Personnel of the Committee on Armed Services, United States Senate, 97th Cong., 2d Sess. 277-89 (1982) [hereinafter

Hearings on S. 2521] (statement of Steven S. Honigman, Chairman of the Committee on Military Justice and Military Affairs of the Association of the Bar of the City of New York); The Military Justice Act of 1983: Hearings on S. 974 Before the Military Personnel and Compensation Subcommittee of the Committee on Armed Services, United States Senate, 98th Cong., 1st Sess. 44-45 (1983) (statement of Steven S. Honigman, Chairman of the Committee on Military Justice and Military Affairs of the Association of the Bar of the City of New York).

²⁰⁶ Hearings on S. 2521, supra note 205, at 278.

²⁰⁷ Id.

²⁰⁸ Id. at 277-89.

²⁰⁹ UCMJ art. 16, 10 U.S.C. § 816 (1988).

²¹⁰ Id.

²¹¹ Id.

²¹² Id.

²¹³ UCMJ art. 22, 10 U.S.C. § 822 (1988); UCMJ art. 23,
10 U.S.C. § 823 (1988); UCMJ art. 24, 10 U.S.C. § 824
(1988).

²¹⁴ UCMJ art. 22.

²¹⁵ UCMJ art. 23.

²¹⁶ UCMJ art. 24.

²¹⁷ UCMJ art. 25, 10 U.S.C. § 825 (1988).

²¹⁸ Id.

²¹⁹ Id.

²²⁰ UCMJ, art. 25(d)(1).

²²¹ UCMJ, art. 25(d)(2).

²²² Id.

²²³ Id.

²²⁴ UCMJ art. 41, 10 U.S.C. § 841 (1988).

²²⁵ Id.

²²⁶ UCMJ art. 41; UCMJ art. 52, 10 U.S.C. § 852 (1988).

²²⁷ UCMJ art. 52(c).

²²⁸ UCMJ art. 41(b).

²²⁹ Id. After the court is assembled, no member can be excused unless by the military judge under Article 41 or by the convening authority for good cause. Whenever the court-martial membership is reduced below a quorum new members may be detailed by the convening authority. UCMJ art. 29, 10 U.S.C. § 829 (1988).

²³⁰ UCMJ, art. 29.

²³¹ UCMJ art. 52(a)(2).

²³² UCMJ art. 51(a), 10 U.S.C. § 851(a) (1988).

²³³ UCMJ art. 52(a)(1).

²³⁴ UCMJ art. 52(b)(3).

²³⁵ UCMJ art. 52(b)(2).

²³⁶ UCMJ art. 37, 10 U.S.C. § 837 (1988).

²³⁷ Id.

²³⁸ Id.

²³⁹ UCMJ art. 98, 10 U.S.C. § 898 (1988).

²⁴⁰ UCMJ art. 16, 10 U.S.C. § 816 (1988).

²⁴¹ UCMJ arts. 22, 23, 24.

²⁴² UCMJ art. 25.

²⁴³ There is no known current empirical data reflecting the common methods of selecting panels. Indeed, since convening authorities change command routinely, any study would have limited value. This example is taken from two articles which recommend procedures for the selection of general and special courts-martial panels by a general court-martial convening authority. See Craig S. Schwender, One Potato, Two Potato . . . A Method to Select Court Members, The Army Lawyer, May 1984, at 12 [hereinafter Schwender]; Karen V. Johnson, "In His Opinion -- A Convening Authority's Guide to the Selection of Panel Members, The Army Lawyer, Apr. 1989, at 43.

A 1972 article in Military Law Review surveyed staff judge advocates to determine the most common methods of

panel member selection. This survey reflected that over 87% of all convening authorities rely on a process wherein the initial recommendations are received from staff elements (predominantly the G-1) within the command. See R.Rex Brookshire, II, Juror Selection Under the Uniform Code of Military Justice: Fact and Fiction, 58 Mil. L. Rev. 71, 114 (1972).

²⁴⁴ An example from a typical Army brigade might be: 3 Lieutenant Colonels; 8 Majors; 15 Captains; 30 Lieutenants and Warrant Officers; 3 Sergeant's Major; 10 Master Sergeants; 15 First Sergeants; 20 Staff Sergeants; 20 Sergeants; and any other soldier in the rank of Corporal or lower meeting the specified criteria for selection. See Schwender, supra note 243, at 19.

²⁴⁵ Id. Other allowable criteria would include factors such as a prerequisite that all nominees not be in a leave or TDY (temporary duty) status for the prescribed period. Id. at 13.

²⁴⁶ Id. at 19. The UCMJ does not specify how long a panel may sit. It is generally up to the discretion of

the convening authority. The convening authority may have a panel sit for an individual case; or the convening authority may select a panel to sit for a period of months. This will vary by unit and mission requirements. Id. at 16-17.

²⁴⁷ Id. at 13.

²⁴⁸ Id.

²⁴⁹ Commonly referred to in the Army as the Alpha Roster.

²⁵⁰ UCMJ art. 25(e); Manual for Courts-Martial, United States, 1984 [hereinafter MCM, 1984], Rule for Courts-Martial 505.

²⁵¹ 28 U.S.C. §§ 1861-78 (1988).

²⁵² ABA Standards, supra note 9.

²⁵³ Baldwin v. New York, 399 U.S. 66 (1970).

²⁵⁴ ABA Standards, supra note 9, Standard 15-1.1.

²⁵⁵ MCM, 1984, Rules for Courts-Martial 401, 1303.

²⁵⁶ Thompson v. Utah, 170 U.S. 343 (1898) (holding that federal jury must consist of twelve members).

²⁵⁷ ABA Standards, supra note 9, Standard 15-1.1

²⁵⁸ Fed. R. Crim. P. 23(a); Singer v. United States, 380 U.S. 24 (1965); ABA Standards, supra note 9, Standard 15-1.2.

²⁵⁹ UCMJ art. 16,; MCM, 1984, Rule for Courts-Martial 903(b)(2).

²⁶⁰ MCM, 1984, Rule for Courts-Martial 903(b)(2)(B) and discussion.

²⁶¹ This article is limited to the selection and composition of courts-martial panel members and does not delve into the areas of preferral and referral. There is a federal corollary to these functions, found in the indictment procedures by grand jury and by information.

²⁶² 28 U.S.C. §§ 1863, 1864 (1988); ABA Standards, supra note 9, Standard 15-2.1.

²⁶³ 28 U.S.C. §§ 1863, 1864 (1988); ABA Standards, supra note 9, Standard 15-2.1.

²⁶⁴ 28 U.S.C. § 1865 (1988); ABA Standards, supra note 9, Standard 15-2.1.

²⁶⁵ UCMJ art. 25(d)(2).

²⁶⁶ ABA Standards, supra note 9, Standard 15-2.1.

²⁶⁷ See infra parts IV.B.2-3.

²⁶⁸ 28 U.S.C. § 1870 (1988); ABA Standards, supra note 9, Standard 15-2.6.

²⁶⁹ 28 U.S.C. § 1870 (1988); ABA Standards, supra note 9, Standard 15-2.6.

²⁷⁰ UCMJ art. 25(e), but see United States v. Hilow, 32 M.J. 439 (C.M.A. 1991) at part IV.B.3, infra.

²⁷¹ UCMJ art. 25(e). This power over the selection process has led Judge Cox to state that "[t]he Government has the functional equivalent of an unlimited number of peremptory challenges." United States v. Carter, 25 M.J. 471, 478 (C.M.A. 1988).

²⁷² UCMJ, art. 41(b), 10 U.S.C. § 841(b) (1988).

²⁷³ UCMJ art. 41(b).

²⁷⁴ Since at least two-thirds of the members must vote guilty to obtain a conviction, panel size can increase or decrease the overall odds of conviction. On a panel of five members, four must vote guilty (.800) to obtain a conviction; on a panel of six members, four must vote guilty (.667); on a panel of seven members, five must vote guilty (.714); on a panel of eight members, six must vote guilty (.750); on a panel of nine members, six must vote guilty (.667); on a panel of ten members, seven must vote guilty (.700); on a panel of eleven members, eight must vote guilty (.727); and so on. For this reason, defense counsel would prefer a panel of five, whereas trial counsel would prefer a panel of six, nine or twelve.

²⁷⁵ See, e.g., Johnson v. Louisiana, 406 U.S. 356 (1972); Apodaca v. Oregon, 406 U.S. 404 (1972); ABA Standards, supra note 9, Standard 15-1.1.

²⁷⁶ UCMJ art. 52.

²⁷⁷ See, e.g., 42 U.S.C. § 1985(2) (1988) (conspiracy to interfere with civil rights: obstruction of justice; intimidating party, witness, or juror); 18 U.S.C. § 201 (1988) (bribery of public officials and witnesses); 18 U.S.C. § 1503 (1988) (influencing or injuring officer or juror); 18 U.S.C. § 1504 (1988) (influencing juror by writing).

²⁷⁸ 71 U.S. (4 Wall.) 2, 123 (1866).

²⁷⁹ Id. at 138 (emphasis added).

²⁸⁰ See, e.g., Parker v. Levy, 417 U.S. 733 (1974) (applying Fifth Amendment due process analysis to vagueness challenge against punitive article of UCMJ); Goldman v. Weinberger, 475 U.S. 503 (1986) (finding the military interest in uniformity sufficiently important to override servicemember's First Amendment right to practice religion by wearing yarmulke).

²⁸¹ 395 U.S. 258 (1969) (creating "service connection" requirement for jurisdiction over service members).

²⁸² 483 U.S. 435 (1987) (abandoning "service connection"

requirement and looking to status of service member at time of the offense).

²⁸³ Solorio v. United States, 483 U.S. at 453-54 (Marshall, J., dissenting) (citing Ex parte Milligan, 71 U.S. (4 Wall.) 2, 123 (1867)). See also Ex parte Quirin, 317 U.S.1 (1942); Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1857).

²⁸⁴ Solorio v. United States, 483 U.S. at 453-54 (Marshall, J. dissenting) (citing Ex parte Milligan, 71 U.S. (4 Wall.) 2, 123 (1867)).

²⁸⁵ Ex parte Milligan, 71 U.S. (4 Wall.) at 122.

²⁸⁶ Justice Harlan, in his dissent in O'Callaghan v. Parker, relies considerably on Hamilton's rationale for a virtually unlimited power of Congress to prescribe rules for the government of the military pursuant to Article I, Section 8, Clause 13. Harlan avers that: "Congress' power to prescribe rules for the government of the armed forces 'ought to exist without limitation: Because it is impossible to foresee or define the extent and variety of national exigencies, or the

corresponding extent & variety of the means which may be necessary to satisfy them.'" 395 U.S. 258, 277 (1969) (quoting from The Federalist No. 23 (Alexander Hamilton)).

Harlan's reliance on Hamilton is interesting in light of the manner in which Hamilton attacked the need for the Seventh Amendment (guaranteeing civil jury trials). Hamilton stated:

The mere silence of the Constitution in regard to civil causes is represented as an abolition of the trial by jury . . . extending not only to every civil but even to criminal causes. To argue with respect to the latter would, however, be as vain and fruitless as to attempt the serious proof of the existence of matter

The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set

upon trial by jury; or if there is any difference in them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.

The Federalist No. 83, at 495, 499 (Alexander Hamilton)(Clinton Rossiter ed., 1961).

See generally, Gordon D. Henderson, Courts-Martial and the Constitution: The Original Understanding, 71 Harv. L. Rev. 293 (1957) for a discussion on this topic. Henderson notes that many of the provisions, such as speedy trial and the confrontation clause, are applicable to the military. Henderson's opinion is that the only rational explanation for the failure of the framers to exclude the military from the Sixth Amendment guarantee of a jury trial is simple oversight. Even Henderson is uncomfortable with this position, but claims that "the documents recording the evolution of these amendments support this view." Henderson does not specify which documents. Id.

²⁸⁷ United States v. Crawford, 35 C.M.R. 3, 6 (C.M.A. 1964); United States v. Kemp, 46 C.M.R. 152, 154 (C.M.A. 1973); United States v. McClain, 22 M.J. 124, 128 (C.M.A. 1986). See also United States v. Carter, 25 M.J. 471, 473 (C.M.A. 1988); United States v. Santiago-Davila, 26 M.J. 380, 386 (C.M.A. 1988) for a discussion as to how the Sixth Amendment requirement that the jury be drawn from a cross-section of the community is inapplicable to courts-martial.

²⁸⁸ Ex parte Milligan, 71 U.S. (4 Wall.) 2, 138 (1867).

²⁸⁹ United States v. Crawford, 35 C.M.R. at 6.

²⁹⁰ See infra part IV.B.1.

²⁹¹ See infra part IV.B.2.

²⁹² See infra part IV.B.3.

²⁹³ United States v. Kemp, 46 C.M.R. 152, 154 (C.M.A. 1973). See also United States v. Carter, 25 M.J. 471 (C.M.A. 1988) (regarding the unwillingness of Judge Cox and Judge Sullivan to use the court's supervisory power to direct that an accused is entitled to another

peremptory challenge whenever new members are detailed because the panel has not maintained a quorum).

²⁹⁴ 20 C.M.R. 377, 384 (C.M.A. 1956).

²⁹⁵ Id. at 384. The court also noted that, by appointing three judge advocates to the special court-martial panel, the convening authority was assured to have one judge advocate remaining after challenges. This is precisely what happened, since the court denied all challenges for cause and the co-accuseds used their respective peremptory challenges on two of the judge advocates. The court further noted that the remaining judge advocate became a de facto law officer when he began slipping notes to the president of the panel, directing him in which manner to rule on objections.

Id.

²⁹⁶ 29 C.M.R. 458, 459 (C.M.A. 1960).

²⁹⁷ Id.

²⁹⁸ Id.

²⁹⁹ Id. at 459.

³⁰⁰ United States v. Crawford, 35 C.M.R. 3, 6 (C.M.A. 1964) (citing United States v. Hedges, 29 C.M.R. 458 (C.M.A. 1960) and United States v. Sears, 20 C.M.R. 377 (C.M.A. 1956)).

³⁰¹ 25 M.J. 471 (C.M.A. 1988).

³⁰² Id. at 474-75, 478-79. Former Chief Judge Everett is of the opinion that Article 41(b) should be read to entitle an accused a peremptory any time additional members are added to the panel because of a lack of a quorum. Chief Judge Sullivan and Judge Cox are of the opinion that the granting of an additional peremptory is discretionary on the part of the military judge. Judge Cox does not feel that peremptory challenges rise to the level of constitutional protection under due process and would resolve the issue based on "fundamental fairness in military jurisprudence." Although Judge Cox did not find that the military judge abused his discretion in disallowing an additional peremptory, he would have granted one in this instance. Id.

³⁰³ Id. at 473 (citing United States v. Thomas, 22 M.J. 388 (C.M.A. 1986), cert. denied, 479 U.S. 1085 (1987)).

³⁰⁴ 476 U.S. 79 (1986).

³⁰⁵ 26 M.J. 380, 390-93 (C.M.A. 1988).

³⁰⁶ Id. at 390.

³⁰⁷ United States v. Karnes, 1 M.J. 92 (C.M.A. 1975); United States v. Barrios, 31 M.J. 750, 754 (A.C.M.R. 1990).

³⁰⁸ 5 M.J. 923, 924-25 (N.C.M.R. 1978), pet. denied, 6 M.J. 305 (C.M.A. 1979).

³⁰⁹ 5 M.J. 832, 834 (A.C.M.R. 1978).

³¹⁰ 435 U.S. 223 (1978) (striking down a state statute which established five-member juries in misdemeanor trials).

³¹¹ Id. at 231-33, nn. 10-11.

³¹² 8 M.J. 598, 602 (A.C.M.R. 1979).

³¹³ UCMJ art. 25.

314 35 C.M.R. 3, 8 (C.M.A. 1964).

315 Id.

316 Id. at 8-12.

317 Id. at 10.

318 Id.

319 43 C.M.R. 72, 78-78 (1970).

320 Id. at 73.

321 Id. at 74-75.

322 Id. at 74.

323 Id. at 75.

324 Id. at 75.

325 Id.

326 Id. at 75-76.

327 Id. at 76.

328 Id. at 78.

³²⁹ Id. at 79.

³³⁰ 1 M.J. 139, 141 (C.M.A. 1975).

³³¹ Id. at 141.

³³² United States v. Autrey, 20 M.J. 912 (A.C.M.R. 1985).

³³³ 7 M.J. 171 (C.M.A. 1979).

³³⁴ Id.

³³⁵ Id. at 172.

³³⁶ Id. at 173. Chief Judge Fletcher did not participate in this decision. Judge Cook wrote the opinion; Judge Perry concurred in the result. Id. at 171, 173.

³³⁷ Id. at 173.

³³⁸ Id. at 172, n.4.

³³⁹ Id. at 173.

³⁴⁰ Where the accused pleaded guilty, the court will not reverse the findings but will order a rehearing on the

sentence. See, e.g., United States v. McClain, 22 M.J. 124 (C.M.A. 1986); United States v. Daigle, 1 M.J. 139 (C.M.A. 1975).

³⁴¹ United States v. Delp, 11 M.J. 836, 838 (A.C.M.R. 1981) (finding the fact that no junior enlisted personnel were on the panel "is permissible so long as the criteria are applied evenhandedly and not used as a device to exclude lower ranking enlisted personnel.").

³⁴² United State v. Livingston, 7 M.J. 638, 640 (A.C.M.R. 1979); United States v. Carman, 19 M.J. 932, 936-37 (A.C.M.R. 1985); United States v. James, 24 M.J. 894, 896 (A.C.M.R. 1987) (burden of proof on appellant); United States v. Hodge, 26 M.J. 596, 599-600 (A.C.M.R. 1988) (burden of proof on appellant by clear and convincing evidence; no evidence of discriminatory intent where no black member on panel, despite overall population in Army of over 10% black).

³⁴³ United States v. Hedges, 29 C.M.R. 458 (1960) (seven of nine members had law enforcement duties). See supra text accompanying notes 296-99.

³⁴⁴ 19 M.J. 932 (A.C.M.R. 1985). See also, United States v. Firmin, 8 M.J. 595, 597 (A.C.M.R. 1979) (holding that "it is not improper for a convening authority in his selection process to look first to officer and enlisted personnel of senior rank because they are more likely to be best qualified by reason of age, education, training, experience, length of service and judicial temperament.").

³⁴⁵ United States v. Carman, 19 M.J. at 935.

³⁴⁶ Id. at 936 (citing United States v. Hedges, 29 C.M.R. 458 (seven of nine members had law enforcement-related duties)).

³⁴⁷ Id. at 936-37.

³⁴⁸ Id. at 935.

³⁴⁹ Id. at 935.

³⁵⁰ Id. at 935, n.3.

³⁵¹ Id. at 936.

³⁵² Id.

³⁵³ 21 M.J. 585, 586-87 (A.C.M.R. 1985).

³⁵⁴ Id. at 586 (emphasis added).

³⁵⁵ Id. at 587.

³⁵⁶ See also United States v. Nixon, 30 M.J. 1210 (A.C.M.R. 1990) (en banc) (court accepted enlisted panel selection by convening authority of three command sergeants major, one sergeant major, and two master sergeants as being based on the criteria in Article 25(d)(2)).

³⁵⁷ United States v. Cunningham, 21 M.J. at 588.

³⁵⁸ See, e.g., United States v. James, 24 M.J. 894, 896 (A.C.M.R. 1987) (lack of lieutenants or warrant officers on panels for past year does not prove systematic exclusion).

³⁵⁹ Crawford v. United States, 35 C.M.R. 3, 13 (C.M.A. 1964).

³⁶⁰ Id. at 13. Judge Ferguson dissented on this point, finding race to be "an impermissible criterion for selection of jurors." Id. at 30.

³⁶¹ United States v. Santiago-Davila, 26 M.J. 380, 389 (C.M.A. 1988).

³⁶² United States v. Carman, 19 M.J. 932, 936 (A.C.M.R. 1985).

³⁶³ See supra note 333-39 and accompanying text. See also, United States v. Kemp, 46 C.M.R. 152, 155 (C.M.A. 1973) ("[T]he convening authority's denial of the accused's request for a truly random selection of court members established his awareness of his responsibility, for in that denial he declared his desire 'to continue to follow the spirit of Article 25(d)(2), UCMJ.'" (emphasis added)).

³⁶⁴ United States v. Smith, 27 M.J. 242, 249 (C.M.A. 1988).

³⁶⁵ Id. at 250-51. Judge Cox wrote a separate concurring opinion. Judge Cox noted that he does not feel that "women are more likely to empathize with the victim of a sex crime." Judge Cox's concurrence was based on his belief that trial counsel impermissibly

became a part of the selection process. Id. at 251-52.

³⁶⁶ United States v. Cook, 18 C.M.R. 715, 717 (A.F.B.R. 1955).

³⁶⁷ Id. at 716-17.

³⁶⁸ Id. at 717.

³⁶⁹ United States v. Crumb, 10 M.J. 520, 527 (A.C.M.R. 1980) (concurring opinion of Senior Judge Jones finds it improper for chief trial counsel to be involved in "culling" process of replacing court members); United States v. Beard, 15 M.J. 768, 772 (A.F.C.M.R. 1983) (actions of assistant trial counsel, who was also the chief of military justice, in making recommendations as to court membership constituted reversible error); United States v. Cherry, 14 M.J. 251, 253 (C.M.A. 1982) (dicta agrees with Senior Judge Jones' concurring opinion in Crumb); United States v. Marsh, 21 M.J. 445, 447-48 (C.M.A. 1986) (establishing that trial counsel are not per se disqualified; allowing exception for ministerial duties such as contacting members to

determine their availability); United States v. Smith, 27 M.J. 242, 250-51 (C.M.A. 1988) (plurality opinion of Chief Judge Everett finding trial counsel nominated "hardcore" female panel members to court-martial involving sex offense for impermissible purpose of influencing court).

³⁷⁰ United States v. Kemp, 46 C.M.R. 152, 155 (C.M.A. 1973).

³⁷¹ 21 M.J. 445.

³⁷² Id. at 447 (citing United States v. Cherry, 14 M.J. 251 (C.M.A. 1982)).

³⁷³ Id. at 447.

³⁷⁴ Id.

³⁷⁵ Id. at 448.

³⁷⁶ Id.

³⁷⁷ Id.

³⁷⁸ United States v. McClain, 22 M.J. 124 (C.M.A. 1986).

The opinion in Marsh was issued on March 31, 1986.

United States v. Marsh, 21 M.J. 445 (C.M.A. 1986). The opinion in McClain was issued on May 5, 1986. 22 M.J. at 124.

³⁷⁹ United States v. McClain, 22 M.J. at 130.

³⁸⁰ Id. at 132-33.

³⁸¹ Both Marsh and McClain were decided by the Court of Military Appeals when it had only two sitting judges, Chief Judge Everett and Judge Cox. United States v. Marsh, 21 M.J. at 445; United States v. McClain, 22 M.J. at 124.

³⁸² United States v. McClain, 22 M.J. at 133.

³⁸³ Id. (Judge Cox infers that he is not convinced that the staff judge advocate did, in fact, make his recommendations to the convening authority for this purpose).

³⁸⁴ Id.

³⁸⁵ Id. at 127 (quoting the trial judge).

³⁸⁶ Id. at 126. The basis for the trial judge's

findings relating to the staff judge advocate is a stipulation of expected testimony of the staff judge advocate, which states in part:

I have been the Staff Judge Advocate for HQ, VII Corps since July, 1980. During this period of time, I have observed that there have been a variety of unusual sentences . . . and some very lenient sentences. . . .

There were repeated rumors that many of these seemingly unusual sentences stemmed from young officers and young enlisted members who had little experience in the military.

. . . .

At the time I presented LTG General Livsey with the list of nominees . . .

I advised him of the criteria that was to be used in making his selection, i.e., those who were the best qualified by reason of age, education, training, length of service, and judicial temperament.

I further reminded him of the nature of the

information that had come to my attention and indicated that the junior officers and enlisted members did not possess these qualifications and that he should consider this information at the time he made his selections. I recommended that he give preference to selecting those individuals who were older and had been in the service longer, over those who were relatively junior in age and experience. LTG Livsey specifically asked me whether such action was lawfully within his discretion and I advised him that it was if he determined that such a selection was appropriate under the criteria [in Article 25].

Id. (emphasis added).

³⁸⁷ Contra United States v. Hilow, 32 M.J. 439 (C.M.A. 1991).

³⁸⁸ Id.

³⁸⁹ Id. at 440.

³⁹⁰ Id. at 442.

³⁹¹ Id. (citing United States v. Greene, 43 C.M.R. 72, 78 (C.M.A. 1970)). The court noted that, in Greene the convening authority was "fully apprised of improper panel-selection [sic] procedures employed by his subordinate, reconsidered his decision and, citing Article 25(d), adhered to his original selections." Id.

³⁹² Id. at 443. The majority opinion notes that appellant's post-trial submission claims that the decision to go judge alone was made because the panel was viewed as a "severe" one. Conversely, the staff judge advocate's post-trial recommendation noted that the election was made as a sub rosa inducement by the defense to attain the government's consent in the offered pretrial agreement. Since neither document was under oath, it was not competent evidence and therefore not "considered." Id.

³⁹³ Id. at 445, n.2 (Cox, J., dissenting on separate grounds).

³⁹⁴ 33 M.J. 679 (A.C.M.R. 1991).

³⁹⁵ Id. at 681.

³⁹⁶ Id. at 681, n.4 (quoting from a transcript of testimony taken by an officer appointed to investigate alleged command influence in a different court-martial).

³⁹⁷ Id.

³⁹⁸ Memorandum, Dep't of Army, Third Judicial Circuit, subject: Inquiry into Selection of Court-Martial Members in the 2d Infantry Division, 11 May 1990.

³⁹⁹ United States v. Redman, 33 M.J. 679, 682 (A.C.M.R. 1991).

⁴⁰⁰ Id. at 683 (disagreeing with the investigating officer's conclusion that there was no violation of Articles 37 or 98 because the panel which was to be replaced was never in fact replaced; nor were they informed of their pending replacement or why they were to be replaced).

⁴⁰¹ Id.

402 Id.

403 See supra note 10 and accompanying text.

404 See supra text accompanying notes 22-24.

405 See supra note 80 and accompanying text.

406 Supra notes 73-78 and accompanying text.

407 Supra note 71 and accompanying text.

408 Supra notes 78-79 and accompanying text.

409 See supra parts III.C.1. and III.C.2

410 See supra part III.C.3.

411 See supra parts III.C.3 and III.C.4.

412 See supra part III.C.5.

413 Supra note 162 and accompanying text.

414 See supra note 77 and accompanying text.

415 UCMJ art. 37; UCMJ, art. 98. There are no reported cases involving Article 98 and the court-martial panel member selection process.

⁴¹⁶ See supra part IV.B.

⁴¹⁷ See supra part IV.B.3.

⁴¹⁸ UCMJ art. 25(d)(2).

⁴¹⁹ See supra notes 344-55 and accompanying text.

⁴²⁰ See supra part II.A.2.

⁴²¹ UCMJ art. 25(d)(2).

⁴²² See supra text accompanying notes 46-51.

⁴²³ See supra text accompanying notes 46-51.

⁴²⁴ See supra note 228 and accompanying text.

⁴²⁵ See supra note 184 and accompanying text.

⁴²⁶ See supra notes 378-84, 389-90, 394-402 and accompanying text.

⁴²⁷ See supra note 396 and accompanying text.

⁴²⁸ United States v. Nixon, 30 M.J. 1210, 1213, n.3 (A.C.M.R. 1990) (en banc).

⁴²⁹ United States v. McClain, 22 M.J. 124, 133 (C.M.A. 1986) (Cox, J., concurring).

⁴³⁰ Id. at 133.

⁴³¹ Lewis Carrol, Alice's Adventures in Wonderland & Through the Looking Glass, reprinted in The Annotated Alice (Martin Gardner ed., Meridian 1960). The staff judge advocate and convening authority faced with a standing panel that continues to adjudge "Article 15 punishment" for serious offenses may feel as though they are lost in the woods, much in the same manner as Alice felt when she encountered Tweedledum and Tweedledee. In response to her "thinking" of a way out of the woods, Tweedledum and Tweedledee offered this guidance: "'I know what you're thinking about,' said Tweedledum; 'but it isn't so, nohow.' 'Contrariwise,' continued Tweedledee, 'if it was so, it might be, and if it were so, it would be; but as it isn't, it ain't. That's logic.'" Id. at 230-31.

The Duchess was equally helpful to Alice, cautioning her to -- "'Never imagine yourself not to be otherwise

than what it might appear to others that what you were or might have been was not otherwise that what you had been would have appeared to them to be otherwise.'" Id. at 122. In considering Judge Cox's contradictory guidance, the staff judge advocate and convening authority might well consider the tactful approach taken by Alice when the Mad Hatter confused her with his nonsensical diatribe about watches. "Alice felt dreadfully puzzled. The Hatter's remark seemed to her to have no sort of meaning in it, yet it was certainly in English. 'I don't understand you,' she said as politely as she could." Id. at 97.

⁴³² Perhaps Judge Cox equates "judicial temperament" to "sentencing philosophy." "Judicial temperament" has never been defined by either Congress or the courts. According to The Random House College Dictionary 724 (rev. ed. 1980), "judicial" means "inclined to make or give judgments; critical; discriminating." Also according to The Random House College Dictionary at 1352, "temperament" is defined as an "unusual personal attitude or nature as manifested by peculiarities of feeling, temper, action; see disposition."

⁴³³ United States v. McClain, 22 M.J. 124, 133 (C.M.A. 1986) (Cox, J. concurring).

⁴³⁴ United States v. Redman, 33 M.J. 679, 681 (A.C.M.R. 1991).

⁴³⁵ United States v. McClain, 22 M.J. at 133 (Cox, J., concurring).

⁴³⁶ For the original version of Dorothy's attempts to return home, see L. Frank Baum, The Wizard of Oz (17th ed., Ballantine Books 1991).

⁴³⁷ Supra note 342 and accompanying text.

⁴³⁸ Memorandum, Dep't of Army, Third Judicial Circuit, subject: Inquiry into Selection of Court-Martial Members in the 2d Infantry Division, 11 May 1990, Transcript at 52 (testimony of convening authority).

⁴³⁹ Id. at 50.

⁴⁴⁰ Id. at 49.

⁴⁴¹ Id. at 14 (testimony of staff judge advocate).

⁴⁴² Id. at 22.

⁴⁴³ Id.

⁴⁴⁴ Id. at 42 (testimony of convening authority).

⁴⁴⁵ See Armed Forces Information Service, Department of Defense, The Armed Forces Officer 122-28; 173-77 (1975).

⁴⁴⁶ MCM, 1984, Rules for Courts-Martial 1107, 1108.

⁴⁴⁷ Carl von Clausewitz, On War 259 (Anatol Rapoport ed., 1968) [hereinafter Clausewitz].

⁴⁴⁸ See, e.g., Sun Tzu, The Art of War 129 (Samuel B. Griffith trans., 1963) ("If a general indulges his troops but is unable to employ them; if he loves them but cannot enforce his commands; if the troops are disorderly and he is unable to control them, they may be compared to spoiled children, and are useless."); Frederick the Great, On the Art of War 77 (by Jay Luvaas trans. & ed., 1966) ("[T]he men still are worth nothing if they are undisciplined. An Army, if one wishes to accomplish anything with it, must obey and be in good discipline.").

⁴⁴⁹ UCMJ, art. 98 ("Any person subject to this chapter who . . . knowingly and intentionally fails to enforce or comply with any provision of this chapter regulating the proceedings before, during, or after trial of an accused; shall be punished as a court-martial may direct.").

⁴⁵⁰ UCMJ art. 37.

⁴⁵¹ MCM, 1984, Rules for Courts-Martial 1107, 1108.

⁴⁵² Gen. Orders No. 88, War Department (14 Jul. 1919).

⁴⁵³ See, Clausewitz, supra note 447, at 25-54; Harry G. Summers, Jr., On Strategy 11-32 (1982).

⁴⁵⁴ Bishop, supra note 4, at 27.

⁴⁵⁵ United States v. Smith, 27 M.J. 242, 252 (C.M.A. 1988) (Cox, J., concurring) (emphasis added).

⁴⁵⁶ UCMJ art. 25(d)(2).

⁴⁵⁷ See supra note 77 and accompanying text.

⁴⁵⁸ For a proposed system where the convening authority would be completely removed from the nomination

process, see R. Rex Brookshire, II, Juror Selection under the Uniform Code of Military Justice: Fact and Fiction, 58 Mil. L. Rev. 71 (1972); Charles W. Schiesser and Daniel H. Benson, A Proposal to Make Courts-Martial Courts: The Removal of Commanders from Military Justice, 7 Tex. Tech. L. Rev. 559 (1976).

⁴⁵⁹ See supra part II.C.

⁴⁶⁰ See supra text accompanying note 83.

⁴⁶¹ Batson v. Kentucky, 476 U.S. 79 (1986); United States v. Santiago-Davila, 26 M.J. 380 (C.M.A. 1988) (giving military accused equal protection right to be tried by a panel from which no cognizable racial group has been excluded). Given the present system, with its variable number of court-martial members, the trial counsel has an incentive to use the peremptory challenge to gain a tactical numerical advantage. See supra note 274.

⁴⁶² United States v. Yager, 7 M.J. 171, 172-73 (C.M.A. 1979). It is also consistent with ABA Standard 15-2.1(c), predicating jury eligibility on both U.S.

citizenship and one year's residency within the geographical district where the court is convened. This standard excludes both resident aliens and individuals who have not yet established residency in the district. It implies that individuals should not become jurors until such time as they have established themselves in the area and have become familiar with the community in which they live. In the military, second lieutenants, warrant officers (WO-1), and privates (E-1 through E-3) are all in an entry level status and have neither established themselves in the military nor become familiar with the values of the unit since they are all recently assigned. Of course, this is inapplicable to individuals who have prior service experience, but these would be relatively small numbers. ABA Standards, supra note 9, Standard 15-2.1; see supra text accompanying note 81.

⁴⁶³ This provision may be criticized on the ground that it will be logistically unmanageable. However, it will not in any way increase the number of man-hours required for court-martial membership. What it will do is alleviate the problem of having a few individuals do

all the duty. Under the present system, we often have very senior personnel expending a great deal of their time performing court-member duties. The benefits of this proposal are twofold: (1) it could be managed much the same way as a duty roster; (2) it would expose more individuals to our system of courts-martial.

⁴⁶⁴ A comprehensive analysis of sentencing guidelines and minimum sentences is beyond the scope of this article. For further discussions in this area, see Albert W. Alschuler, The Failure of Sentencing Guidelines: A Plea for Less Aggregation, 58 U. Chi. L. Rev. 901 (1991); Ilene H. Nagel, Structuring Sentencing Discretion: The New Federal Sentencing Guidelines, 80 J. Crim. L. & Criminology 883 (1990); William W. Wilkins, Jr. & John R. Steer, Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines, 41 S.C. L. Rev. 495 (1990); Johnathon E. Scharff, Federal Sentencing Guidelines Due Process Denied, 33 St. Louis U. L.J. 1049 (1989).

⁴⁶⁵ United States v. McClain, 22 M.J. 124, 133 (C.M.A. 1986) (Cox, J., concurring).

⁴⁶⁶ Critics will undoubtedly contend that the proposed system is not logistically tenable, especially in time of war. Nothing could be more inaccurate. In fact, given a set six-member general court-martial and a set three-member special court-martial, total man-hours should be significantly reduced. In addition, with minimum sentences the convening authority will not feel the need to use commanders for panel membership -- freeing them to concentrate fully on command.

RECOMMENDED AMENDMENTS TO UCMJ

*denotes change

§ 816. Art. 16. Courts-martial classified

The three kinds of courts-martial in each of the armed forces are --

- (1) general courts-martial, consisting of --
 - * (A) a military judge and six members; or
 - (B) only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with the defense counsel, requests orally on the record or in writing a court composed only of a military judge and the military judge approves;
- (2) special courts-martial, consisting of --
 - * (A) three members; or
 - * (B) a military judge and three members; or
 - (C) only a military judge, if one has been detailed to the court, and the accused under the same conditions prescribed in clause (1)(B) so requests; and
- (3) summary courts-martial, consisting of one

commissioned officer.

§825. Art. 25. Who may serve on courts-martial

* (a) Any commissioned officer on active duty in the grade of O-2 or higher is eligible to serve on all courts-martial for the trial of any person who may be lawfully brought before such courts for trial.

* (b) Any warrant officer on active duty in the grade of CW-2 or higher is eligible to serve on general and special courts-martial for the trial of any person, other than a commissioned officer, who may lawfully be brought before such courts for trial.

* (c)(1) Any enlisted member of an armed force on active duty in the grade of E-4 or higher who is not a member of the same unit as the accused is eligible to serve on general and special courts-martial for the trial of any enlisted member of an armed force who may lawfully be brought before such courts for trial.

(2) In this article, "unit" means any regularly organized body as defined by the Secretary concerned, but never a body larger than a company, squadron, ship's crew, or body corresponding to one of them.

(d)(1) When it can be avoided, no member of an

armed force may be tried by a court-martial any member of which is junior to him in rank or grade.

* (2) When convening a general or special court-martial, the convening authority will detail a panel commissioner to select members. The panel commissioner will be either a member of the trial judiciary, officially certified under applicable service regulations as an inspector general, or such other person who has been detailed by the convening authority with the prior approval of the Judge Advocate General.

* (3) Convening authorities will submit nominees for court-martial membership to the panel commissioner. Nominees will be obtained by the convening authority without regard to any consideration other than the availability of the nominated member due to mission requirements or operational readiness. The convening authority will nominate those numbers of nominees that the convening authority feels will be required, given the anticipated caseload. Nominees for the pool will be evenly distributed by rank. A lower rank will not be underrepresented in the member nominee pool in relation to a higher rank. An exception may be

granted to this requirement by the Judge Advocate General for units with a disproportionate number of higher ranking personnel to lower ranking personnel. Nominees will be submitted to the pool for a specified period of availability for duty, as designated by the convening authority.

* (e)(1) The panel commissioner will, upon notification of referral, draw by random selection the members for any given court-martial. Any member drawn who does not meet the requirements of (c)(1) and (d)(1) above will be placed back in the member pool. Six members and four alternates will be empaneled for a general court-martial. Three members and three alternates will be empaneled for a special court-martial. The military judge or convening authority can direct that more alternates be empaneled, as warranted by a particular case. Once members are empaneled for any particular case, they are removed from the member nominee pool until the nominee pool is expended and they are again nominated by the convening authority.

(2) The drawing of panel members will be open for public observation. The panel commissioner will notify all empaneled members of the uniform, date,

time, and location of the court-martial. The panel commissioner will relieve any panel member from duty before arraignment if any commander designated as a convening authority in sections 822, 823, or 824 (articles 22, 23, or 24) certifies in writing that relief is necessary due to physical disability, mission requirements, or operational readiness.

§829. Art. 29. Absent and additional members.

* (a) No member of a general or special court-martial may be absent or excused after the court has been assembled for the trial of the accused unless excused as a result of a challenge, excused by the military judge for physical disability or other good cause, or excused by order of the convening authority for good cause. All members and alternates will be subject to voir dire after arraignment. Any member excused as a result of a challenge will be replaced by the next alternate in order of selection by the panel commissioner.

* (b) Whenever a general court-martial composed of members is reduced below a quorum of six members, the next alternate in order of selection by the panel

commissioner will be empaneled. The trial may proceed with the new members present after the recorded evidence previously introduced before the members of the court has been read to the court in the presence of the military judge, the accused, and counsel for both sides.

* (c) Whenever a special court-martial composed of members is reduced below a quorum of three members, the next alternate in order of selection by the panel commissioner will be empaneled. The trial may proceed with the new members present after the recorded evidence previously introduced before the members of the court has been read to the court in the presence of the military judge, the accused, and counsel for both sides if a verbatim record is available. If no verbatim record is available, the trial shall proceed as if no evidence has been received.

(d) If the military judge of a court-martial composed of a military judge only is unable to proceed with the trial because of physical disability, as a result of a challenge, or for other good cause, the trial shall proceed, subject to any applicable conditions of section 816(1)(B) or (2)(C) of this title

(article 16(1)(B) or (2)(C)), after the detail of a new military judge as if no evidence had previously been introduced, unless a verbatim record or a stipulation of the evidence previously introduced is read in court in the presence of the new military judge, the accused, and counsel for both sides.